

70 Am. Jur. 2d Sheriffs, Police, and Constables IV A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Sheriffs, Police, and Constables

Romualdo P. Eclavea, J.D. and Alan J. Jacobs, J.D.

IV. Duration and Termination of Tenure

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  5 to 7, 12 to 14, 17 to 21

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A.L.R. Index, Constables

A.L.R. Index, Deputies

A.L.R. Index, Marshals

A.L.R. Index, Police and Law Enforcement Officers

A.L.R. Index, Public Officers and Employees

A.L.R. Index, Sheriffs

West's A.L.R. Digest, [Sheriffs and Constables](#)  5 to 7, 12 to 14, 17 to 21

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 17

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A. In General

§ 17. Office as property

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  7, 14

The office of sheriff is subject to the generally accepted view that, at least as against the public interest, a public office is not the property of the officeholder within the provision of the Federal Constitution against deprivation of property without due process of law.¹ However, the privileges of one holding public office are, within certain limitations, entitled to the protection of the law.²

A police officer does not have a vested property right in a transfer to a section of the police department, but may have an expectancy of a transfer under the rules and regulations governing transfers, which expectancy does not rise to the level of a vested property interest protected under the Due Process Clause.³

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Footnotes

- ¹ [Am. Jur. 2d, Public Officers and Employees § 12.](#)
- ² [Am. Jur. 2d, Public Officers and Employees §§ 12, 48 to 56.](#)
- ³ [Alford v. City of Dallas, 738 S.W.2d 312 \(Tex. App. Dallas 1987\).](#)

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 18

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A. In General

§ 18. Office as property—Interest of deputy sheriffs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  17 to 20

The procedures governing the removal of deputy sheriffs from office depend upon whether the deputy sheriff is considered to have a property interest in the position in a particular jurisdiction; this, in turn, depends upon whether the deputy's employment is terminable at the will of the sheriff. Where a sheriff has absolute control over the selection and retention of deputy sheriffs, deputy sheriffs have no property or liberty interests in their positions for purposes of the Fourteenth Amendment of the Federal Constitution and comparable state statutory and constitutional provisions.¹ Where a deputy sheriff is terminable "at will," the deputy has no property interest in the position of deputy sheriff.² In these jurisdictions, deputy sheriffs have no legal entitlement to their jobs as public employees.³ Nor does a deputy sheriff acquire a contract right to the office by virtue of a disciplinary procedure unilaterally adopted by the sheriff, which the sheriff may similarly modify or completely revoke at will.⁴

However, in certain cases, a deputy sheriff may be a permanent employee, and therefore may maintain successfully that a procedure used for dismissal violated the constitutional right to due process of law, for example, where the deputy was not afforded an opportunity to explain the charges prior to the effective date of the dismissal.⁵ Under a state statute, a deputy sheriff may have a protected due process property interest in continued employment with a county sheriff's department.⁶

Oral assurances or promises received from former sheriffs that an officer has a permanent position does not suffice to form a property interest in a particular police assignment that is protected by due process.⁷

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Footnotes

- 1 Funn v. Winston, 612 F.2d 880 (4th Cir. 1980); Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984); Heard v.
Hannah, 51 F. Supp. 3d 1129 (N.D. Ala. 2014); Brevard County v. Miller, 452 So. 2d 1104 (Fla. 5th DCA
1984).
- 2 Rodriguez v. Escalon, 90 Fed. Appx. 776 (5th Cir. 2004) (applying Texas law).
- 3 Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981).
- 4 Szell v. Lamar, 414 So. 2d 276 (Fla. 5th DCA 1982).
- 5 Pipkin v. Board of Supervisors, 82 Cal. App. 3d 652, 147 Cal. Rptr. 502 (3d Dist. 1978) (permanent deputy
sheriff acting as a matron in the jail).
- 6 Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013) (Wyoming statute); Potts v. Davis
County, 551 F.3d 1188 (10th Cir. 2009) (Utah statute); San Joaquin Deputy Sheriffs' Ass'n v. County of San
Joaquin, 898 F. Supp. 2d 1177 (E.D. Cal. 2012) (California statute); Cockroft v. Moore, 638 F. Supp. 2d
1024 (W.D. Wis. 2009) (Wisconsin statute).
- 7 Fitzgerald v. El Dorado County, 94 F. Supp. 3d 1155 (E.D. Cal. 2015).

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A. In General

§ 19. Term of office

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  5, 12, 21

Terms of most public officers are fixed by constitution or statute.¹ A sheriff's term of office must be distinguished from the tenure of the occupant of the office. The word "term," when used in reference to an office, ordinarily means a fixed and definite period of time and is distinct from the tenure of the officer, which tenure may be shortened by resignation or removal.²

For purposes of a statute forbidding the election of a sheriff for more than two consecutive terms, a person who is appointed to fill a vacancy in the office of sheriff, and who is subsequently elected to that office and serves as sheriff during the next succeeding term of office, has served all or part of two consecutive terms and is ineligible to be elected sheriff for the term immediately following the second of the two consecutive terms.³

The appointed term of a United States marshal is four years.⁴ A marshal must continue to perform the duties of the office until a successor is appointed and qualifies unless the marshal is sooner removed by the President.⁵

Though viewed as public officers, appointed deputies have no statutorily prescribed term of office and serve solely at the pleasure of the sheriffs.⁶ A deputy sheriff's term as a deputy expires automatically when the sheriff's tenure of office expires.⁷ The use of holdover deputy sheriffs appointed by a previous sheriff may serve to facilitate the transfer of power from one sheriff to a successor, especially where appointments made by the new sheriff must be confirmed by a court after the date the term commences.⁸

The appointment of a special deputy sheriff may be only temporary,⁹ and the deputy's duties and privileges may vary considerably depending upon the circumstances.¹⁰ The expiration of a deputy's term occurs regardless of any wrongdoing on the part of the deputy and without any action on the part of the sheriff.¹¹

Where a state constitutional provision and a county charter provision are in conflict as to the term of office of a county sheriff, the state constitutional provision governs, and the county charter provision to the contrary is invalid.¹²

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Footnotes

- 1 Am. Jur. 2d, Public Officers and Employees §§ 135 to 150.
- 2 Carver v. Sheriff of La Salle County, 203 Ill. 2d 497, 272 Ill. Dec. 312, 787 N.E.2d 127 (2003) (term of sheriff set by statute; duty of sheriff is continuous for term, without regard to who is in office); Andersen v. Sundlun, 625 A.2d 213 (R.I. 1993); State ex rel. Rushford v. Meador, 165 W. Va. 48, 267 S.E.2d 169 (1980).
- 3 State ex rel. Rushford v. Meador, 165 W. Va. 48, 267 S.E.2d 169 (1980).
- 4 28 U.S.C.A. § 561(b).
- 5 28 U.S.C.A. § 561(b).
- 6 Jenkins v. Weatherholtz, 909 F.2d 105 (4th Cir. 1990) (applying Virginia law).
- 7 Brady v. Fort Bend County, 145 F.3d 691, 49 Fed. R. Evid. Serv. 1014 (5th Cir. 1998) (applying Texas law).
- 8 State ex rel. Dingess v. Scaggs, 156 W. Va. 588, 195 S.E.2d 724 (1973).
- 9 Bell v. Duffy, 111 Cal. App. 3d 643, 168 Cal. Rptr. 753 (4th Dist. 1980).
- 10 Bell v. Duffy, 111 Cal. App. 3d 643, 168 Cal. Rptr. 753 (4th Dist. 1980); Carty v. State, 421 N.E.2d 1151 (Ind. Ct. App. 1981).
- 11 El Paso County Sheriff's Deputies' Ass'n, Inc. v. Samaniego, 802 S.W.2d 727 (Tex. App. El Paso 1990), writ denied, (June 5, 1991).
- 12 Enders v. Rossi, 45 A.D.2d 447, 358 N.Y.S.2d 782 (4th Dep't 1974).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 20

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IV. Duration and Termination of Tenure

A. In General

§ 20. Suspension

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 21

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[Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty, 9 A.L.R.4th 614](#)

Forms

Forms regarding the removal of a sheriff from office, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

A public officer ordinarily may be suspended from office pending determination of the existence of grounds for removal from office. The power to suspend is considered as included in the power of removal since suspension is merely a less severe disciplinary measure than removal.¹ A constitutional provision authorizing the governor to suspend county officers extends to the suspension of sheriffs.²

The suspension of a peace officer does not necessarily require the observance of the same procedural safeguards required in the removal of an officer, although when suspension occurs, the officer should be notified of the charges with sufficient specificity to formulate and present a defense.³ In some instances, a distinction is made between a formal suspension, which triggers due process protections, and other lesser actions.⁴ The procedure for resolving a dispute as to the validity of a suspension may be set forth in local statutes or in a collective-bargaining agreement with the officer's union.⁵ Additionally, a meaningful postsuspension remedy may be provided pursuant to statute or a collective-bargaining agreement.⁶ An officer may be reinstated after an improper suspension.⁷

A police officer's indefinite suspension for misconduct is not equivalent to a permanent dismissal or termination; during such a suspension, the officer remains within the chief's supervision or jurisdiction.⁸

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Footnotes

- 1 [Am. Jur. 2d, Public Officers and Employees §§ 218 to 221.](#)
- 2 [In re Advisory Opinion to Governor-School Bd. Member-Suspension Authority, 626 So. 2d 684, 87 Ed. Law Rep. 673 \(Fla. 1993\).](#)
- 3 [Crowder v. State ex rel. Baker, 285 So. 2d 33 \(Fla. 4th DCA 1973\).](#)
As to due process requirements in removal of a peace officer, see §§ 28 to 30.
- 4 [Dixon v. City of New Richmond, 334 F.3d 691 \(7th Cir. 2003\)](#) (part-time police officer removed from the department's call list pending resolution of charges against officer in another city; no formal disciplinary procedures instituted against officer, and part-time officers received work only on an as-needed basis, with chief retaining sole discretion regarding staffing needs).
- 5 [Gomez v. City of Brownsville, 976 S.W.2d 291 \(Tex. App. Corpus Christi 1998\)](#) (under terms of provision of local government code declaring that state or local civil service provision would prevail over collective bargaining contract unless collective-bargaining contract specifically provides otherwise).
- 6 [Lolling v. Patterson, 966 F.2d 230 \(7th Cir. 1992\)](#) (applying Illinois law); [Seger v. City of Lancaster, Ky., 930 F. Supp. 2d 821 \(E.D. Ky. 2013\)](#) (Kentucky police officers' bill of rights).
- 7 [§ 22.](#)
- 8 [Goode v. Firefighters' and Police Officers' Civil Service Com'n of City of Houston, 976 S.W.2d 822 \(Tex. App. Houston 1st Dist. 1998\).](#)

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IV. Duration and Termination of Tenure

A. In General

§ 21. Resignation, abandonment, or vacation of office

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 21

The right of a public officer to resign is well recognized,¹ and this is true of a sheriff or constable. However, a constable's resignation may not be effective to vacate office where a state constitutional provision states that all officers must continue to perform their duties until their successors are duly qualified.²

Observation:

A peace officer may not have a constitutionally protected expectation of privacy in allegations by employers or a licensing authority that the peace officer has resigned under a threat of termination and was "at risk" as an employee. The reasons for resignation are not so highly personal or intimate as to require constitutional protection.³

Whether a resignation is made under such duress or other conditions as to constitute a constructive discharge is a question of fact.⁴

An elected constable does not forfeit office, along with its accompanying powers, by moving to a residence outside the district from which the constable was elected, absent the commencement of removal proceedings.⁵

A deputy sheriff's resignation ordinarily becomes irrevocable when accepted by the sheriff even if the resignation is not immediately effective.⁶ Alternately, a resignation may be deemed effective immediately upon tender under some statutory schemes.⁷ Additionally, a peace officer's position may be deemed effectively resigned where the officer does not attempt to return to work following a leave of absence nor to notify the appropriate persons of any intention regarding the position.⁸

To withdraw a resignation, the resigning officer must act before any action is taken to accept the resignation,⁹ and must do so in a manner that complies with the procedure used to resign, or such other procedure as is mandated by statute. The failure to withdraw a resignation in a timely fashion and in compliance with the formal requirements renders a withdrawal ineffective.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Because county sheriff's deputy tendered his resignation under threat of wrongful termination, sheriff abused his discretion in refusing to allow deputy to withdraw resignation; deputy was entitled under statute to hearing before being terminated for misconduct, but he was never provided with one. [McKinney's Civil Service Law § 75](#). [Ortlieb v. Lewis County Sheriff's Dept.](#), 155 A.D.3d 1628, 65 N.Y.S.3d 390 (4th Dep't 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Am. Jur. 2d, Public Officers and Employees §§ 152 to 158.](#)
- 2 [Crawford v. State](#), 153 S.W.3d 497 (Tex. App. Amarillo 2004).
- 3 [Stidham v. Peace Officer Standards And Training](#), 265 F.3d 1144 (10th Cir. 2001).
- 4 [Jones v. Fitzgerald](#), 285 F.3d 705 (8th Cir. 2002).
- 5 [Chambliss v. State](#), 801 So. 2d 824 (Miss. Ct. App. 2001).
- 6 [McCluskey v. Lansdell](#), 571 So. 2d 312 (Ala. Civ. App. 1990); [Haberer v. Woodbury County](#), 560 N.W.2d 571 (Iowa 1997).
- 7 [Schultz v. Oakland County](#), 187 Mich. App. 96, 466 N.W.2d 374 (1991).
- 8 [Mason v. Cumberland County](#), 92 N.J.A.R.2d (CSV) 210, 1992 WL 251926 (N.J. Admin. Ct. 1992).
- 9 [Haberer v. Woodbury County](#), 560 N.W.2d 571 (Iowa 1997).
- 10 [Mickle v. Latimer County](#), 1990 OK CIV APP 41, 793 P.2d 308 (Ct. App. Div. 1 1990) (sheriff's oral attempt to notify clerk and board member of intent to withdraw resignation was ineffective).

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IV. Duration and Termination of Tenure

A. In General

§ 22. Reinstatement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 21

Forms

Petitions or applications for writs of mandamus related to reinstatement to police force or sheriff's department, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables[[Westlaw®\(r\) Search Query](#)]

A public officer who is wrongfully ousted from an office that the officer holds by clear legal title is entitled to be restored to it by mandamus, provided the office is not filled by an occupant having color of title.¹ Reinstatement may be made by state agency directive where the agency possesses such authority.²

A sheriff's department employee has standing to sue for compliance with an order requiring reinstatement based on a violation of her recall rights; the employee's personal stake in enforcement manifests the requisite concrete adverseness.³

Caution:

Under some statutory schemes, a police officer terminated upon being convicted of a felony has no right to a reinstatement hearing where the conviction is reversed on appeal; under such a statute, the officer's position becomes vacant at the time of the conviction, and the officer no longer has a protectable property interest in the former office.⁴

The right to reinstatement may under certain circumstances be waived, as, for example, where a deputy sheriff discharged from office by the sheriff subsequently runs for the office of sheriff itself.⁵

A statute of limitations may bar a demand for reinstatement to a deputy sheriff's position.⁶ Laches may also be a bar to the bringing of an action in mandamus for reinstatement of a discharged deputy sheriff even where it is within the applicable statute of limitations. The giving of improper legal advice may be a factor in determining whether or not a discharged public officer is guilty of laches in the timing of bringing a claim for unjustified dismissal.⁷

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Footnotes

- 1 See generally Am. Jur. 2d, Mandamus.[[Westlaw®\(r\) Search Query](#)]
- 2 [Clinton County v. Kramarsky](#), 90 A.D.2d 649, 456 N.Y.S.2d 264 (3d Dep't 1982) (finding agency had no authority to reinstate deputy where sheriff was not found guilty of wrongfully discharging deputy).
- 3 [State ex rel. Carver v. Hull](#), 70 Ohio St. 3d 570, 1994-Ohio-449, 639 N.E.2d 1175 (1994).
- 4 [Briggins v. McGuire](#), 67 N.Y.2d 965, 502 N.Y.S.2d 985, 494 N.E.2d 90 (1986).
- 5 [State ex rel. Moore v. Sanders](#), 65 Ohio St. 2d 72, 19 Ohio Op. 3d 264, 418 N.E.2d 1339 (1981).
- 6 [Mitchell v. Essex County Sheriff's Dept.](#), 14 A.D.3d 825, 788 N.Y.S.2d 243 (3d Dep't 2005) (demand must be made within one year of date of informing county sheriff that deputy no longer suffers from a disability and presenting report from psychologist to support assertion that disability ceased).
- 7 [State ex rel. Moore v. Sanders](#), 65 Ohio St. 2d 72, 19 Ohio Op. 3d 264, 418 N.E.2d 1339 (1981).

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IV. Duration and Termination of Tenure

B. Removal from Office


[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 17

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A.L.R. Index, Constables
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A.L.R. Index, Police and Law Enforcement Officers
A.L.R. Index, Public Officers and Employees
A.L.R. Index, Sheriffs
West's A.L.R. Digest, [Sheriffs and Constables](#)  6, 13, 17

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IV. Duration and Termination of Tenure

B. Removal from Office

1. In General

§ 23. Power to remove from office

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 17

Forms

Forms seeking removal from office, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [[Westlaw®\(r\) Search Query](#)]

The sovereign power which creates a public office may also fix the terms upon which it is to be held and delegate the power of removing the incumbent from office.¹ Thus, although removal from office is drastic and penal,² peace officers may be removed from office by proper authority³ upon various grounds, many of which are specifically enumerated by statute. A United States marshal can be removed by the President at any time prior to the expiration of the statutory term of office.⁴

Where the employment of a police officer or deputy is for an indefinite term, it may be terminated at will;⁵ a limited exception exists to such a termination where it is based on the employer's ordering or requiring that an employee commit an illegal act as a condition of employment⁶ or for some other public policy reason.⁷ A governing body may remove a sheriff by a vote of that body where the body is specifically prohibited from interfering with the independent and constitutionally designated investigative and prosecutorial functions of the sheriff; such a vote is facially constitutional.⁸

Caution:

References to the termination of a deputy's service refer to demotions, reprimands, and suspensions in the context of discipline, and should be distinguished from the expiration of a term of office, which occurs regardless of any wrongdoing on the part of the deputy and without any action on the part of the sheriff.⁹

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Footnotes

- 1 [Am. Jur. 2d, Public Officers and Employees §§ 168 to 199.](#)
- 2 [State v. Callaway, 268 N.W.2d 841 \(Iowa 1978\).](#)
- 3 [§ 27.](#)
- 4 [Martin v. Tobin, 451 F.2d 1335 \(9th Cir. 1971\).](#)
- 5 [Burt v. City of Burkburnett, 800 S.W.2d 625 \(Tex. App. Fort Worth 1990\), writ denied, \(Mar. 27, 1991\).](#)
- 6 [Burt v. City of Burkburnett, 800 S.W.2d 625 \(Tex. App. Fort Worth 1990\), writ denied, \(Mar. 27, 1991\).](#)
- 7 [McCoy v. Caldwell County, 145 S.W.3d 427 \(Mo. 2004\).](#)
- 8 [Penrod v. County Of San Bernardino, 126 Cal. App. 4th 185, 23 Cal. Rptr. 3d 717 \(4th Dist. 2005\).](#)
- 9 [El Paso County Sheriff's Deputies' Ass'n, Inc. v. Samaniego, 802 S.W.2d 727 \(Tex. App. El Paso 1990\), writ denied, \(June 5, 1991\).](#)

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 24

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B. Removal from Office

1. In General

§ 24. Grounds for removal

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West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 17

A.L.R. Library

[First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9](#)

A public officer is generally protected by statute from discharge except for some cause, such as misconduct¹ or failure to perform official duties properly.² This rule has been made applicable to deputy sheriffs by express statute,³ or deemed to extend, by implication, the general rules regarding public employees generally to the removal of deputy sheriffs.⁴

As an employee at will,⁵ a sheriff's deputy can be fired for any reason, or no reason at all, but cannot be discharged for an unconstitutional reason,⁶ such as violation of First Amendment rights.⁷ By one view, a sheriff does not violate a deputy sheriff's First Amendment free speech and associational rights by terminating the deputy sheriff on the basis of loyalty and support for the former sheriff⁸ or, where the officers are policy makers, for campaigning for the sheriff's opponent⁹ although some jurisdictions require an allegation that the political activity causes a disruption of governmental functions.¹⁰ There is, also, authority to the contrary.¹¹ And, a deputy sheriff's familial relationship to a sheriff's political nemesis is insufficient to show

that the relationship was a substantial or motivating factor in a dismissal so as to support a claim that the dismissal violated the deputy's First Amendment right to familial relationships.¹²

Where statute specifies that a deputy sheriff can be terminated from office only for one or more expressly enumerated causes, termination may be based on any one such enumerated cause.¹³ Among the causes justifying removal of a deputy under such a statute are notoriously disgraceful conduct of the deputy,¹⁴ willful disobedience of an order,¹⁵ insubordination,¹⁶ and incompetence.¹⁷

Physical limitations rendering the officer unable to perform the duties of office may also be a ground for dismissal.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

County sheriff's interest in efficiency of his office outweighed community's interest in hearing his deputy's speech against him during reelection campaign, and thus sheriff did not violate deputy's free speech rights by declining to reappoint him because of his political speech; sheriff was elected official who had overriding interest in implementing his policies through his subordinates, and deputy was policymaker in county who could be terminated for political disloyalty. *U.S. Const. Amend. 1. McCaffrey v. Chapman*, 921 F.3d 159 (4th Cir. 2019).

There was no evidence supporting the finding that police officer employee's speech in support of sheriff's opponent was a motivating factor in his termination, and thus employer and various employees were not liable in officer's § 1983 First Amendment retaliation claims or in his breach of contract claims based on allegations that employer violated its employment plan by failing to prevent unlawful political discrimination. *U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Taylor v. Cook County Sheriff's Office*, 442 F. Supp. 3d 1031 (N.D. Ill. 2020).

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Footnotes

- 1 § 25.
- 2 Am. Jur. 2d, Public Officers § 183.
- 3 *Greene v. Barrett*, 174 F.3d 1136 (10th Cir. 1999) (applying Wyoming law; "cause" is defined as a cause or justification which bears a reasonable relationship to deputy sheriff's ability and fitness to perform and discharge the duties of the position); *Zurek v. Cook County Police and Corrections Merit Bd.*, 42 Ill. App. 3d 1044, 1 Ill. Dec. 797, 356 N.E.2d 1079 (1st Dist. 1976).
As to grounds for removal, suspension, or demotion of civil service employees generally, see Am. Jur. 2d, Civil Service[Westlaw®(r) Search Query].
- 4 *Batley v. Kendall County Sheriff's Dept. Merit Commission*, Kendall County Ill., 99 Ill. App. 3d 622, 55 Ill. Dec. 28, 425 N.E.2d 1201 (2d Dist. 1981).
- 5 §§ 14, 18, 23.
- 6 *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996) (applying South Carolina law); *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998) (applying Florida law).
- 7 *Phillips v. Bowen*, 278 F.3d 103 (2d Cir. 2002) (applying New York law); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (applying Nebraska law); *Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997) (applying Florida law).

- 8 [Cutcliffe v. Cochran](#), 117 F.3d 1353 (11th Cir. 1997) (applying Florida law).
- 9 [Jenkins v. Medford](#), 119 F.3d 1156 (4th Cir. 1997) (applying North Carolina law); [Wilbur v. Mahan](#), 3 F.3d 214 (7th Cir. 1993) (applying Illinois law).
- 10 [Brady v. Fort Bend County](#), 58 F.3d 173 (5th Cir. 1995), dismissed, (Nov. 17, 1995).
- 11 [Brady v. Fort Bend County](#), 145 F.3d 691, 49 Fed. R. Evid. Serv. 1014 (5th Cir. 1998) (applying Texas law; political activity took place during off-duty hours and did not consist of negative statements about challenger, and challenger testified that he ought to be able to work with deputy who had supported incumbent); [Heggen v. Lee](#), 284 F.3d 675, 2002 FED App. 0094P (6th Cir. 2002) (applying Kentucky law; finding deputy sheriffs do not fall within policymaking exception).
- 12 [Cutcliffe v. Cochran](#), 117 F.3d 1353 (11th Cir. 1997).
- 13 [Matter of Setchell](#), 261 N.W.2d 354 (Minn. 1977).
- 14 [Kott v. City of Fairbanks](#), 661 P.2d 177 (Alaska 1983) (erasing video of potential evidence of use of excessive force).
- 15 [Erickson v. Fisher](#), 170 Mont. 491, 554 P.2d 1336 (1976).
- 16 [State, Dept. of Highway Safety and Motor Vehicles v. Zimmer](#), 398 So. 2d 463, 15 A.L.R.4th 1197 (Fla. 4th DCA 1981).
- 17 [De Anda v. State](#), 131 S.W.3d 198 (Tex. App. San Antonio 2004) (faulty transfer of title to five motor vehicles kept for public auction).
- 18 [Jordan v. Dodge County Sheriff's Dept.](#), 205 F.3d 1346 (8th Cir. 2000); [Tarrant County v. Van Sickle](#), 98 S.W.3d 358 (Tex. App. Fort Worth 2003).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 25

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Sheriffs, Police, and Constables

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IV. Duration and Termination of Tenure

B. Removal from Office

1. In General

§ 25. Grounds for removal—Misconduct or official misbehavior

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 17

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[Federal and State Constitutional Provisions and State Statutes as Prohibiting Employment Discrimination Based on Heterosexual Conduct or Relationship](#), 123 A.L.R.5th 411

[Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in the public service](#), 11 A.L.R.4th 826

[Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty](#), 9 A.L.R.4th 614

[Removal of public officer for misconduct during previous term](#), 42 A.L.R.3d 691

[What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office](#), 52 A.L.R.2d 1314

Forms

Forms regarding removal from office, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables[[Westlaw®\(r\) Search Query](#)]

Sexual misconduct by an officer, either within the context of an officer's official duties,¹ or not occurring in the context of official duties,² may be grounds for dismissal from office.

An officer's striking a civilian may form the basis for removal³ as may violation of a department personnel policy by speaking to an arrestee in a condescending, demeaning, and patronizing manner.⁴ An officer's false accusation of an innocent private citizen may also be misconduct warranting dismissal.⁵

Knowing failure to report the loss of a service revolver for several days is a ground for dismissal,⁶ as is use of the office to obtain and then pawn a firearm, expending the proceeds for personal use.⁷

Various misuses of the public's funds or property may provide the grounds for the peace officer's removal from office on the grounds of misconduct⁸ as well as for criminal prosecution of the officer.⁹ Longstanding custom or practice does not excuse the violation of a statute fixing the amounts to be spent and contemplating the charging of the actual costs.¹⁰

The acceptance of gratuities from civilians¹¹ and attending to personal matters while on duty¹² may be grounds for removal.

Relatively minor misconduct, including the utterance of a single profane remark, may be deemed insufficient cause for discharge.¹³ However, where speech is involved, the peace officer's First Amendment rights must also be considered to the extent that the speech is public in context.¹⁴ A sheriff may require an officer to answer questions about the disappearance of evidence from the officer's custody or forfeit the officer's job, without violating the officer's privilege against self-incrimination, provided that the officer is not asked to waive immunity from criminal prosecution or forced to answer incriminating questions under the threat of termination; questioning is part of a sheriff's internal administrative investigation, not a criminal prosecution.¹⁵

The failure to complete a probationary period satisfactorily is a ground for removal from office.¹⁶

Where a showing of "willful misconduct" is necessary as a ground for removal, establishing such misconduct requires a breach of duty committed knowingly and with a purpose to do wrong. This requires proof of grave misconduct.¹⁷

Sheriffs, constables, and other peace officers, are subject to removal under statutes or constitutional provisions authorizing the forfeiture of office by public officers who appoint relatives to positions.¹⁸

Commission of a crime,¹⁹ and failing to report fellow officers who committed crimes in the officer's presence,²⁰ may warrant dismissal.

Knowingly giving false testimony to a grand jury is a ground for dismissal.²¹

Where a police department rule requires officers to obtain permission to engage in off-duty employment, then the failure to obtain permission, and the violation of the rule by moonlighting without permission, are a valid basis for discharge, particularly

where the outside work is related to and conflicts with police work, and even though the police department has not enforced the regulation in all instances.²²

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Footnotes

- 1 [Scott v. County of Richardson](#), 280 Neb. 694, 789 N.W.2d 44 (2010) (sexually propositioning a dispatcher, who was a fellow employee of the sheriff's department, and lying about the incident to supervisor).
- 2 [Marcum v. McWhorter](#), 308 F.3d 635, 2002 FED App. 0324P (6th Cir. 2002) (adulterous relationship); [Fleisher v. City of Signal Hill](#), 829 F.2d 1491 (9th Cir. 1987) (officer admitted sexual relations with a minor who was his girlfriend); [Anderson v. State Personnel Bd.](#), 194 Cal. App. 3d 761, 239 Cal. Rptr. 824 (2d Dist. 1987) (public officer's repeated public nudity); [McHenry v. City of East St. Louis](#), 210 Ill. App. 3d 861, 155 Ill. Dec. 259, 569 N.E.2d 259 (5th Dist. 1991) (recognizing rule, but finding insufficient evidence); [Ruiz v. Brown](#), 179 A.D.2d 543, 579 N.Y.S.2d 47 (1st Dep't 1992) (sexual transactions with prostitute); [Warren v. City of Asheville](#), 74 N.C. App. 402, 328 S.E.2d 859 (1985); [Olson v. Borough of Homestead](#), 66 Pa. Commw. 120, 443 A.2d 875 (1982) (conviction for indecent assault and corrupting the morals of 13-year-old stepdaughter).
- 3 [Hickey v. Bratton](#), 180 A.D.2d 682, 579 N.Y.S.2d 724 (2d Dep't 1992).
- 4 [Spencer v. Zobrist](#), 323 S.W.3d 391 (Mo. Ct. App. W.D. 2010) (even though officer presented evidence that would have supported a contrary decision).
- 5 [Zazycki v. City of Albany](#), 94 A.D.2d 925, 463 N.Y.S.2d 614 (3d Dep't 1983).
- 6 [Mellette v. Ward](#), 155 A.D.2d 272, 547 N.Y.S.2d 35 (1st Dep't 1989).
- 7 [Board on Law Enforcement Officer Standards and Training v. Rushing](#), 752 So. 2d 1085 (Miss. Ct. App. 1999).
- 8 [State ex inf. Ashcroft v. Riley](#), 590 S.W.2d 903 (Mo. 1979); [Barone v. City of Dunkirk](#), 57 A.D.2d 1040, 395 N.Y.S.2d 809 (4th Dep't 1977), order [aff'd](#), 45 N.Y.2d 876, 410 N.Y.S.2d 811, 383 N.E.2d 113 (1978); [State ex rel. Hightower v. Smith](#), 671 S.W.2d 32 (Tex. 1984).
- 9 §§ 156 to 160.
- 10 [State ex inf. Ashcroft v. Riley](#), 590 S.W.2d 903 (Mo. 1979).
- 11 [Saporita v. Brown](#), 180 A.D.2d 597, 580 N.Y.S.2d 306 (1st Dep't 1992); [Smith v. State ex rel. Hightower](#), 673 S.W.2d 704 (Tex. App. Tyler 1984) (accepting rent-free apartment in exchange for continued patrol of apartment complex).
- 12 [Saporita v. Brown](#), 180 A.D.2d 597, 580 N.Y.S.2d 306 (1st Dep't 1992).
- 13 [Batley v. Kendall County Sheriff's Dept. Merit Commission](#), Kendall County Ill., 99 Ill. App. 3d 622, 55 Ill. Dec. 28, 425 N.E.2d 1201 (2d Dist. 1981).
- 14 [Teague v. City of Flower Mound, Tex.](#), 179 F.3d 377 (5th Cir. 1999) (speech made in context of grievance procedure was not protected speech).
As to political speech, see § 24.
- 15 [Hill v. Johnson](#), 160 F.3d 469 (8th Cir. 1998).
- 16 [Fleisher v. City of Signal Hill](#), 829 F.2d 1491 (9th Cir. 1987).
- 17 [State v. Callaway](#), 268 N.W.2d 841 (Iowa 1978).
- 18 [State ex inf. Roberts v. Buckley](#), 533 S.W.2d 551 (Mo. 1976).
- 19 [Scaturico v. Ward](#), 159 A.D.2d 221, 552 N.Y.S.2d 24 (1st Dep't 1990). (breaking and entering; stealing food stamps); [Britt v. North Carolina Sheriffs' Educ. and Training Standards Com'n](#), 348 N.C. 573, 501 S.E.2d 75 (1998).
As to conviction of crime as a ground for removal, see § 26.
- 20 [Scaturico v. Ward](#), 159 A.D.2d 221, 552 N.Y.S.2d 24 (1st Dep't 1990).
- 21 [Richardson v. Ward](#), 159 A.D.2d 277, 552 N.Y.S.2d 279 (1st Dep't 1990).
- 22 [Dalton v. City of Russellville](#), 290 Ark. 603, 720 S.W.2d 918 (1986).

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IV. Duration and Termination of Tenure

B. Removal from Office

1. In General

§ 26. Grounds for removal—Criminal activity, with or without conviction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 17

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[What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139](#)

[Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732](#)

If an internal affairs investigation determines that a deputy stole money from an arrestee, conviction of criminal theft is not required in order to dismiss the deputy; the standard of proof that would be needed for a criminal conviction is not required.¹

Conviction of a crime, of various specified degrees, may provide the grounds for the removal of a sheriff or other peace officer from office.² A plea of guilty, waiving the right to conviction by a jury, to one of the crimes within such a statute, may constitute a conviction justifying the sheriff's removal from office³ as may a plea of "no contest."⁴ As regards the effect of an appeal of the conviction, it has been held that a conviction under such a statute justifies the removal of a sheriff from office, even though the conviction is presently on appeal, because the public interest in the integrity of public officials requires that a public official be free from criminal taint and not be blemished with a conviction of felony.⁵

Caution:

Where conviction of a crime is not itself an express ground for removal, but forms the basis for another ground, such as conduct so intimately related to official duties as to constitute a per se violation of the oath of office,⁶ then the conviction's underlying circumstances must be examined to determine whether the actions themselves rise to this level of misconduct.⁷

Violation of a departmental "zero tolerance" policy, by conviction for a criminal offense, will support dismissal.⁸ Administering a hair follicle drug test and considering the positive result for drugs in terminating the officer's employment is not improper.⁹ However, merely testing positive for drug use will not suffice for dismissal where there is an alternative reason for a positive test.¹⁰

Caution:

Neither the governor, state attorney general, or state peace officer standards and training council are required to seek a sheriff's removal from office, despite the sheriff's alleged commission of numerous crimes against state citizens, in the absence of a criminal indictment.¹¹

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Footnotes

- 1 [Harden v. Marion County Sheriff's Dept.](#), 799 F.3d 857 (7th Cir. 2015) (stated reason for dismissal not a pretext for dismissal based on retaliation).
- 2 [Morrison v. Warren](#), 375 F.3d 468, 2004 FED App. 0223P (6th Cir. 2004) (applying Ohio law; postdischarge conviction of crime as basis); [Welch v. State ex rel. Long](#), 880 S.W.2d 79 (Tex. App. Tyler 1994), writ denied, (Nov. 3, 1994).
- 3 [Welch v. State ex rel. Long](#), 880 S.W.2d 79 (Tex. App. Tyler 1994), writ denied, (Nov. 3, 1994) (even though no prison sentence was served).
- 4 [Britt v. North Carolina Sheriffs' Educ. and Training Standards Com'n](#), 348 N.C. 573, 501 S.E.2d 75 (1998).
- 5 [State ex inf. Peach v. Goins](#), 575 S.W.2d 175 (Mo. 1978).
- 6 § 25.
- 7 [Sharkey v. Police Dept., Town of Southampton](#), 179 A.D.2d 655, 578 N.Y.S.2d 599 (2d Dep't 1992) (finding that guilty plea to off-duty misdemeanor driving while intoxicated was not sufficient to warrant summary

termination where safety hearing bureau determined that officer could not have avoided accident which led to charges whether drunk or sober).

8 [Morrison v. Warren, 375 F.3d 468, 2004 FED App. 0223P \(6th Cir. 2004\)](#) (posthearing conviction supported dismissal even though dismissal was based on preconviction conduct).

9 [Deitch v. City of New York, 90 A.D.3d 924, 935 N.Y.S.2d 79 \(2d Dep't 2011\)](#).

10 [Garrido v. Cook County Sheriff's Merit Bd., 349 Ill. App. 3d 68, 285 Ill. Dec. 71, 811 N.E.2d 312 \(1st Dist. 2004\)](#) (deputy's consumption of herbal tea causing positive test for cocaine).

11 [Gipson v. Bowers, 263 Ga. 379, 434 S.E.2d 490 \(1993\)](#).

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IV. Duration and Termination of Tenure

B. Removal from Office

2. Procedure

§ 27. Power or authority to remove from office

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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In the absence of constitutional restraint or prohibition, the legislature may delegate the authority to remove a sheriff or other peace officer to the county level of government.¹ A sheriff may have authority to remove a deputy.²

United States marshals are presidential appointees and subject to removal only by the President³ and to applicable civil service regulations.⁴ Deputy marshals may be removed by marshals⁵ or by the Director of United States marshals.⁶

Observation:

Where charges are pending in another jurisdiction against an officer, it does not constitute a constructive discharge for a part-time officer to be required to surrender credentials pending resolution of those charges.⁷

CUMULATIVE SUPPLEMENT

Cases:

Statute creating county sheriff's merit board does not authorize the sheriff either explicitly or by implication to appoint an individual to the merit board for less than a six-year term; purpose of statute is to select individuals to serve on the merit board with goal of achieving an experienced and politically balanced board, which would be compromised if the sheriff could appoint a member for less than the six-year term provided in the statute. S.H.A. 55 ILCS 5/3–7002. *Taylor v. Dart*, 2016 IL App (1st) 143684, 407 Ill. Dec. 745, 64 N.E.3d 123 (App. Ct. 1st Dist. 2016).

County sheriff had a right to intervene in disciplinary proceedings regarding lieutenant in sheriff's office, where sheriff, as the party initiating the disciplinary proceedings in the first instance, had a cognizable interest in the proceedings and was an essential party to any litigation having an effect on sheriff's decision to recommend disciplinary action be taken against lieutenant. *W. Va. R. Civ. P. 24. Matheny v. Scolapio*, 807 S.E.2d 278 (W. Va. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Delaney v. Del Bello](#), 81 A.D.2d 566, 437 N.Y.S.2d 405 (2d Dep't 1981).
As to removal of public officers generally, see Am. Jur. 2d, Public Officers and Employees[[Westlaw®\(r\)](#) Search Query].
- 2 [Samaniego v. Arguelles](#), 737 S.W.2d 88 (Tex. App. El Paso 1987).
- 3 28 U.S.C.A. § 561(b).
- 4 28 U.S.C.A. § 562.
- 5 28 U.S.C.A. § 562.
- 6 [Bruzzone v. Hampton](#), 433 F. Supp. 92 (S.D. N.Y. 1977).
- 7 [Dixon v. City of New Richmond](#), 334 F.3d 691 (7th Cir. 2003).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 28

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IV. Duration and Termination of Tenure

B. Removal from Office

2. Procedure

§ 28. Manner of effecting removal

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The procedure for removal of a public officer may vary among states¹ and even among counties of the same state.² However, where the state constitution, or valid statutes authorized under it, prescribe a method of procedure for removal of county officers, the method is deemed exclusive and resort may not be had to methods not so prescribed.³

Statute may provide for the removal of a peace officer or public officer by the quo warranto procedure,⁴ impeachment,⁵ or a petition for recall.⁶

Where a deputy sheriff or other peace officer must maintain a training or other licensing certificate, the recall of the certificate may also effect a removal of the officer.⁷

Where the statute provides for the automatic forfeiture of a sheriff's office upon commission of acts of official misconduct, all that is necessary is the establishment of the facts in a proper proceeding and a judicial declaration of forfeiture.⁸

Where a distinction is recognized between the offices of deputy sheriff and undersheriff, the procedures required for the removal of a deputy sheriff from office, such as a requirement for written notice and for cause for termination, may not be applicable to the removal of an undersheriff from office.⁹

Under due process requirements generally, peace officers may be entitled to notice of the charges against them¹⁰ and, except under extraordinary circumstances, to a fair predeprivation hearing.¹¹ Where a grievance procedure is applicable, due process

will require adherence to the procedure.¹² However a deputy is not deprived of procedural due process merely because the hearing was necessitated by pre-discharge conduct, while the discharge was upheld based on postdischarge conduct, where a second hearing on the postdischarge conduct would not have made any difference in the outcome, and the deputy had sufficient time to contest postdischarge allegation.¹³

Where the sheriff is authorized to conduct a proceeding, the sheriff may be disqualified by personal involvement in the proceeding.¹⁴ In some instances, the use of an independent hearing examiner is authorized.¹⁵ To establish bias on the part of a sheriff as an administrative decision-maker in a disciplinary proceeding against officers so as to support a finding of a violation of due process, the officers must demonstrate that the sheriff has a personal or financial stake in the decision or some personal bitterness regarding the subject of the decision.¹⁶

In some cases, sheriffs or other peace officers may be removed from office by virtue of the reorganization of the districts to which they were appointed; the removal of the incumbents from office pursuant to such a reorganization of districts is not a denial of due process.¹⁷

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Footnotes

- 1 [Am. Jur. 2d, Public Officers and Employees §§ 168 to 199.](#)
- 2 [General Drivers, Local No. 346 v. Aitkin County Bd., 320 N.W.2d 695 \(Minn. 1982\).](#)
- 3 [State ex rel. Kelly v. Baker, 580 S.W.2d 611 \(Tex. Civ. App. Amarillo 1979\); King v. Logan County Deputy Sheriffs' Civil Service Com'n, 187 W. Va. 510, 420 S.E.2d 270 \(1992\) \(procedural requirements must be exhausted\).](#)
- 4 [State ex inf. Roberts v. Buckley, 533 S.W.2d 551 \(Mo. 1976\); Crawford v. State, 153 S.W.3d 497 \(Tex. App. Amarillo 2004\) \(to remove constable\).](#)
As to quo warranto procedures, see [Am. Jur. 2d, Quo Warranto §§ 1 et seq.](#)
- 5 [Shusted v. Coyle, 139 N.J. Super. 314, 353 A.2d 562 \(Law Div. 1976\) \(rejected by, Application of Burlington County Bd. of Chosen Freeholders, 99 N.J. 90, 491 A.2d 631 \(1985\)\) \(rejected on other grounds by Application of Burlington County Bd. of Chosen Freeholders, 99 N.J. 90, 491 A.2d 631 \(1985\)\).](#)
As to impeachment of public officers generally, see [Am. Jur. 2d, Public Officers and Employees §§ 213 to 217.](#)
- 6 [Baker v. Gibson, 22 Kan. App. 2d 36, 913 P.2d 1218 \(1995\) \(finding petition inadequate\); Steadman v. Halland, 197 Mont. 45, 641 P.2d 448 \(1982\); State ex rel. Kelly v. Baker, 580 S.W.2d 611 \(Tex. Civ. App. Amarillo 1979\); Matter of Recall of Morrisette, 110 Wash. 2d 933, 756 P.2d 1318 \(1988\) \(finding petition inadequate\).](#)
As to recall of public officers generally, see [Am. Jur. 2d, Public Officers and Employees §§ 200 to 212.](#)
- 7 [Board on Law Enforcement Officer Standards and Training v. Rushing, 752 So. 2d 1085 \(Miss. Ct. App. 1999\).](#)
- 8 [State ex inf. Ashcroft v. Riley, 590 S.W.2d 903 \(Mo. 1979\).](#)
As to self-executing constitutional or statutory provisions regarding the forfeiture of public office, see [Am. Jur. 2d, Public Officers and Employees.\[Westlaw®\(r\) Search Query\]](#)
- 9 [Holly v. Preuss, 172 Mont. 422, 564 P.2d 1303 \(1977\).](#)
- 10 [Morrison v. Warren, 375 F.3d 468, 2004 FED App. 0223P \(6th Cir. 2004\) \(oral notice sufficient\); Lucero v. City of Los Angeles, 208 Cal. App. 3d 664, 256 Cal. Rptr. 303 \(2d Dist. 1989\) \(method of service\); Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 \(2010\).](#)
- 11 [Michalesko v. Freeland Borough, 18 F. Supp. 3d 609 \(M.D. Pa. 2014\) \(Third Circuit rule\); Lukin v. City and County of San Francisco, 187 Cal. App. 3d 807, 232 Cal. Rptr. 1 \(1st Dist. 1986\).](#)
- 12 [Buzek v. County of Saunders, 972 F.2d 992 \(8th Cir. 1992\).](#)

- 13 [Morrison v. Warren](#), 375 F.3d 468, 2004 FED App. 0223P (6th Cir. 2004) (hearing in Ohio based on domestic violence charges).
- 14 [Goodwin v. McHenry County Sheriff's Office Merit Com'n](#), 306 Ill. App. 3d 251, 239 Ill. Dec. 287, 713 N.E.2d 818 (2d Dist. 1999); [Wayering v. County of St. Lawrence](#), 154 A.D.2d 824, 546 N.Y.S.2d 258 (3d Dep't 1989).
- 15 [Quintanar v. County of Riverside](#), 230 Cal. App. 4th 1226, 179 Cal. Rptr. 3d 82 (4th Dist. 2014), as modified, (Oct. 24, 2014); [Clarke v. Cleveland](#), 53 A.D.3d 894, 861 N.Y.S.2d 519 (3d Dep't 2008); [Nuchia v. Tippy](#), 973 S.W.2d 782 (Tex. App. Tyler 1998).
- 16 [Pruitt v. Howard County Sheriff's Dept.](#), 96 Md. App. 60, 623 A.2d 696 (1993).
A former deputy did not receive due process in a suspension for purposes of deputy's action alleging retaliation for supporting the sheriff's opponent in a political election. The deputy did not receive hearing prior to the suspension, and no emergency situation or valid public safety reason warranted deprivation of hearing. [Sallitt v. Stankus](#), 720 F. Supp. 2d 645 (M.D. Pa. 2010).
- 17 [Tarrant County v. Ashmore](#), 635 S.W.2d 417 (Tex. 1982).

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IV. Duration and Termination of Tenure

B. Removal from Office

2. Procedure

§ 29. Manner of effecting removal—Investigation of charges; evidence

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From an evidentiary standpoint, where the peace officer is deemed to be a civil service employee, then any evidentiary rules concerning the manner of taking testimony at the hearing on the charges for which removal is sought must be followed; if not, the matter may be remanded for a proper hearing in accordance with the rules.¹

An investigation by a sheriff's department into cheating by deputy sheriff trainees is an internal disciplinary investigation even when the evidence of wrongdoing theoretically could lead to a criminal investigation; because it is not a criminal investigation, a "reasonableness" standard, rather than probable cause standard, governs the issue of whether the alleged seizure of trainees during the course of the investigation is unreasonable under the Fourth Amendment.² There must be substantial evidence to support requests from officers for such investigative information as a urinalysis.³ In the course of the investigation of charges against the officer, the officer may be ordered to submit to a polygraph examination to determine whether there is cause for the termination of the officer's civil service employment.⁴

The officer must generally be advised of the qualified nature of the right to remain silent before administrative sanctions, such as dismissal for insubordination, can be invoked, including the fact that silence may be deemed insubordination, leading to administrative discipline, and that any statement made under the compulsion of a threat of such discipline cannot be used against the officer in any subsequent criminal proceeding.⁵ The peace officer's voluntary exercise of the Fifth Amendment privilege against self-incrimination during interviews and conferences does not deprive the officer of the due process right and opportunity to be heard on charges whether in initial interviews, at predisciplinary conferences, or at posttermination hearings.⁶

CUMULATIVE SUPPLEMENT

Cases:

Deputy sheriff failed to preserve for appellate review assertion that he was entitled to predisciplinary hearings prior to termination of his employment, where deputy sheriff did not raise issue in his petition for appeal to circuit court following administrative hearing, and circuit court did not consider issue or make any conclusions or findings related to it. [Fruth v. Powers](#), 806 S.E.2d 465 (W. Va. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [McLean v. Mecklenburg County](#), 116 N.C. App. 431, 448 S.E.2d 137 (1994) (Police Civil Service Rules requiring that the witnesses against the officers be present, testify under oath, and be subject to cross-examination by counsel for the accused officers).
- 2 [Myers v. Baca](#), 325 F. Supp. 2d 1095 (C.D. Cal. 2004).
- 3 [Palmer v. Koehler](#), 156 A.D.2d 242, 548 N.Y.S.2d 502 (1st Dep't 1989).
- 4 [Evans v. DeRidder Mun. Fire](#), 815 So. 2d 61 (La. 2002).
- 5 [Williams v. City of Los Angeles](#), 47 Cal. 3d 195, 252 Cal. Rptr. 817, 763 P.2d 480 (1988).
- 6 [Harrison v. Wille](#), 132 F.3d 679 (11th Cir. 1998), as amended, (Apr. 1, 1998).

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IV. Duration and Termination of Tenure

B. Removal from Office

2. Procedure

§ 30. Review by courts of act of removal; power to review

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  6, 13, 17

A.L.R. Library

[Injunction as remedy against removal of public officer, 34 A.L.R.2d 554](#)

The standard of review applied to an administrative determination to remove a peace officer is whether the removal exceeds the bounds of reason so as to be an abuse of the administrative board's discretion¹ or, by an alternate phrasing, be so disproportionate to the offense as to shock the conscience or shock one's sense of fairness.² Charges must be supported by substantial evidence.³ Review is permissible where it is claimed that evidence of postdischarge conduct was admitted to a posttermination hearing without prior notice so that the officer was surprised and had no time to prepare a defense.⁴

The propriety of a penalty imposed by an administrative agency rests within the sound discretion of the agency and will not be disturbed absent an abuse of discretion; neither a trial court nor a reviewing court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.⁵ A finding of fact by the administrative agency removing the officer should not be overturned unless contrary to the manifest weight of the evidence.⁶

CUMULATIVE SUPPLEMENT

Cases:

Administrative penalty of dismissal as member of village fire department was not so disproportionate to offenses as to be shocking to one's sense of fairness, and thus penalty could not be judicially set aside, where fire department's fire council had dismissed member upon finding him guilty of violating department's constitution and by-laws. [DeStefano v. Incorporated Village of Mineola](#), 167 A.D.3d 740, 90 N.Y.S.3d 209 (2d Dep't 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Nicolini v. County of Tuolumne](#), 190 Cal. App. 3d 619, 235 Cal. Rptr. 559 (5th Dist. 1987).
As to the removal of public officers generally, see Am. Jur. 2d, Public Officers and Employees[[Westlaw®\(r\)](#) Search Query].
- 2 [Klein v. McGowan](#), 198 F.3d 705 (8th Cir. 1999); [Floyd v. Chaffin](#), 201 Ga. App. 597, 411 S.E.2d 570 (1991); [Kelly v. Safir](#), 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280 (2001).
- 3 [Nicolini v. County of Tuolumne](#), 190 Cal. App. 3d 619, 235 Cal. Rptr. 559 (5th Dist. 1987); [Palmer v. Koehler](#), 156 A.D.2d 242, 548 N.Y.S.2d 502 (1st Dep't 1989).
- 4 [Morrison v. Warren](#), 375 F.3d 468, 2004 FED App. 0223P (6th Cir. 2004).
- 5 [Anderson v. State Personnel Bd.](#), 194 Cal. App. 3d 761, 239 Cal. Rptr. 824 (2d Dist. 1987).
- 6 [Batley v. Kendall County Sheriff's Dept. Merit Commission](#), Kendall County Ill., 99 Ill. App. 3d 622, 55 Ill. Dec. 28, 425 N.E.2d 1201 (2d Dist. 1981).

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70 Am. Jur. 2d Sheriffs, Police, and Constables V Refs.

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V. Powers and Duties

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Research References

West's Key Number Digest

West's Key Number Digest, [Municipal Corporations](#) 🔑 268

West's Key Number Digest, [Sheriffs and Constables](#) 🔑 77 to 88, 93 to 96, 103, 114 to 118

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A.L.R. Index, Constables

A.L.R. Index, Deputies

A.L.R. Index, Marshals

A.L.R. Index, Police and Law Enforcement Officers

A.L.R. Index, Sheriffs

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West's A.L.R. Digest, [Sheriffs and Constables](#) 🔑 77 to 88, 93 to 96, 103, 114 to 118

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 31

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Sheriffs, Police, and Constables

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V. Powers and Duties

§ 31. Sheriff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  77 to 88, 93 to 96, 103, 114 to 118

Forms

Forms Regarding the Rights, Duties, and Liabilities of Sheriffs, Police, Constables, and Their Sureties, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

Where the sheriff's office is created under the state constitution, the sheriff's authority arises under the state constitution and the state's statutes.¹ Where sheriffs are constitutional officers whose powers and duties are not expressly enumerated in the constitution, such powers and duties are proscribed by the common law as modified by the acts of the legislature.² However, the sheriff cannot be divested, by statute, of those powers and duties possessed under common law and incorporated into the state constitution.³

Common law duties are many and varied and encompass more than traditional law enforcement.⁴ Thus, the sheriff is generally the chief law enforcement officer of the county,⁵ and, as a general rule, sheriffs, within the scope of their respective jurisdictions, are given power, and have the duty, to preserve the peace and public order,⁶ enforce the criminal laws,⁷ prevent, detect and investigate crime,⁸ provide security for courts, serve criminal warrants and other writs and summonses, and transport prisoners.⁹

A police officer on off-duty status is not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general; indeed, police officers are considered to be under a duty to respond in that capacity 24 hours a day.¹⁰

Under the statutory duty of the sheriff to keep the peace, the sheriff is only required to respond to calls, and is not required to supply a road patrol,¹¹ although there may be implied a stricter duty to maintain law and order in those areas not adequately policed by local authorities or otherwise patrolled.¹² As a result, to the extent that patrolling the roads is not within the statutory peacekeeping duties of the sheriff, a sheriff may be required to seek authorization from the county legislative body rather than the courts to hire additional road deputies.¹³

The sheriff traditionally performs a variety of ministerial or administrative duties required of an officer of the court.¹⁴ Thus, the sheriff is required to attend upon courts of record,¹⁵ to serve original process, and to execute and return mesne and final process.¹⁶

Where modified by statute or constitutional provision, the powers and duties of a sheriff may vary from one county to another within some states.¹⁷

A county sheriff may be vested by the legislature with the authority to settle litigation filed against the sheriff's office and to direct the office to pay that settlement.¹⁸

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Footnotes

- 1 [Francisco v. State](#), 113 Ariz. 427, 556 P.2d 1 (1976); [Christopher v. Sussex County](#), 77 A.3d 951 (Del. 2013); [Lewis v. Hinds County Circuit Court](#), 158 So. 3d 1117 (Miss. 2015).
- 2 [Soper v. Montgomery County](#), 294 Md. 331, 449 A.2d 1158 (1982).
- 3 [Fortney v. School Dist. of West Salem](#), 108 Wis. 2d 167, 321 N.W.2d 225, 4 Ed. Law Rep. 1281 (1982).
- 4 [Fitzpatrick v. Welch](#), 96 Idaho 280, 527 P.2d 313 (1974); [Milwaukee Deputy Sheriff's Ass'n v. Clarke](#), 2009 WI App 123, 320 Wis. 2d 486, 772 N.W.2d 216 (Ct. App. 2009).
For a discussion of statutory variations in the powers and duties of sheriffs, generally, see § 31.
- 5 § 2.
- 6 [Morris v. Faulkner](#), 46 Ill. App. 3d 625, 5 Ill. Dec. 112, 361 N.E.2d 112 (5th Dist. 1977); [State v. Lewisohn](#), 379 A.2d 1192 (Me. 1977); [Soper v. Montgomery County](#), 294 Md. 331, 449 A.2d 1158 (1982); [Linehan v. Rockingham County Com'rs](#), 151 N.H. 276, 855 A.2d 1271 (2004); [Cirasuolo v. Hasenauer](#), 64 A.D.2d 860, 407 N.Y.S.2d 357 (4th Dep't 1978) (sheriff is public official responsible for effective discipline in department and charged with public duty to protect community and those under the sheriff's control from influences inimical to rule of law); [Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO](#), 2007 WI 72, 301 Wis. 2d 266, 732 N.W.2d 828 (2007).
- 7 [Soper v. Montgomery County](#), 294 Md. 331, 449 A.2d 1158 (1982); [Mozingo v. Barnhart](#), 169 W. Va. 31, 285 S.E.2d 497 (1981).
- 8 [Bergman v. U.S.](#), 565 F. Supp. 1353, 37 Fed. R. Serv. 2d 442 (W.D. Mich. 1983) (applying Alabama law); [Soper v. Montgomery County](#), 294 Md. 331, 449 A.2d 1158 (1982); [Lucas v. Lake County](#), 253 Or. App. 39, 289 P.3d 320 (2012).
- 9 [Soper v. Montgomery County](#), 294 Md. 331, 449 A.2d 1158 (1982); [Lucas v. Lake County](#), 253 Or. App. 39, 289 P.3d 320 (2012).
- 10 [Nauenburg v. Lewis](#), 265 Neb. 89, 655 N.W.2d 19 (2003).
- 11 [Brownstown Tp. v. Wayne County](#), 68 Mich. App. 244, 242 N.W.2d 538 (1976); [State ex rel. Windham v. LaFever](#), 486 S.W.2d 740 (Tenn. 1972).
- 12 [Brownstown Tp. v. Wayne County](#), 68 Mich. App. 244, 242 N.W.2d 538 (1976).
- 13 [Smith v. Plummer](#), 834 S.W.2d 311 (Tenn. Ct. App. 1992).
- 14 [State v. Graham](#), 203 N.W.2d 600 (Iowa 1973); [Fisch v. Allsop](#), 4 P.3d 204 (Wyo. 2000).

- 15 Wisconsin Professional Police Ass'n (WPPA) v. Dane County, 106 Wis. 2d 303, 316 N.W.2d 656 (1982).
16 Sheriff of Baltimore City v. Abshire, 44 Md. App. 256, 408 A.2d 398 (1979).
 As to duty of sheriff to execute writs, generally, see § 40.
17 Soper v. Montgomery County, 294 Md. 331, 449 A.2d 1158 (1982); Worlledge v. City of Greenwood, 627
 S.W.2d 328 (Mo. Ct. App. W.D. 1982).
18 Carver v. Sheriff of La Salle County, 203 Ill. 2d 497, 272 Ill. Dec. 312, 787 N.E.2d 127 (2003).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 32

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V. Powers and Duties

§ 32. Sheriff—Discretionary functions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  77 to 88, 93 to 96, 103, 114 to 118

Certain matters may be left within the sheriff's discretion under the common law or statutory frameworks, generally allowing the sheriff to choose the ways and means of performing a recognized duty,¹ including decisions as to the deployment of law enforcement officers within the county,² delegation to particular deputies of the powers of law enforcement entrusted to the sheriff,³ and allocation of appropriated moneys within the items of the budget.⁴

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Footnotes

- 1 [Washington County v. Washington County Deputy Sheriff's Ass'n](#), 192 Wis. 2d 728, 531 N.W.2d 468 (Ct. App. 1995).
- 2 [Weber v. City of Sachse](#), 591 S.W.2d 563 (Tex. Civ. App. Dallas 1979), dismissed, (Feb. 6, 1980).
- 3 [National Union of Police Officers Local 502-M, AFL-CIO v. Board of Com'rs of Wayne County](#), 93 Mich. App. 76, 286 N.W.2d 242 (1979).
- 4 [Weitzenfeld v. Dierks](#), 312 So. 2d 194 (Fla. 1975).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 33

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V. Powers and Duties

§ 33. Deputy sheriffs; other persons acting for sheriff

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  77 to 88, 93 to 96, 103, 114 to 118

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[Validity, construction, and application of regulations regarding outside employment of governmental employees or officers, 62 A.L.R.5th 671](#)

Even at common law, a deputy was the personal agent and representative of the sheriff,¹ and, under modern jurisprudence, a deputy acts for the sheriff in the sheriff's name and stead.²

A deputy is the sheriff's alter ego³ and has all the sheriff's sovereign powers, except the power to appoint other deputies, so that a deputy's actions are those of the sheriff, except the power to appoint other deputies.⁴ However, the distinction is made that a deputy acts in the service of the public or the municipality in the performance of criminal duties but acts as the personal agent of the sheriff in the performance of various civil duties.⁵ Nevertheless, at least one jurisdiction has maintained that whether a deputy sheriff holds a fiduciary or administrative relationship to the sheriff is a question of fact dependent on the actual duties assigned to and performed by the deputy sheriff.⁶ Evidence of tortious wrongdoing on the part of sheriff's deputies must be established before liability can be imputed to the sheriff.⁷

The sheriff exercises considerable control over the conditions of employment of deputies, including raises, promotions, job assignments, and tenure,⁸ subject to the limits of the state's civil service law, if applicable.⁹ The sheriff may even set rules for the uniform appearance of deputies, including hair styles and facial appearance, so that a favorable police-like image is

fostered where valid reasons for such rules exist.¹⁰ Absent legislative restrictions, a sheriff may lawfully forbid deputies and other employees to engage in off-duty employment although factual issues may arise as to what activities constitute a violation of the condition.¹¹

The powers and duties of a deputy sheriff may be closely regulated by statute. The statutes of more than one jurisdiction specify that a deputy sheriff possesses all of the powers and authority granted by law to the sheriff and may perform any of the duties and exercise any functions of the sheriff.¹²

Additionally, because a deputy has an implicit duty to see that the law is upheld, a deputy sheriff's investigation of alleged irregularities within the sheriff's department falls within the scope of the deputy's public duty.¹³

The powers and duties of the deputy sheriff may vary from one county to another.¹⁴

Observation:

A statute may validly prohibit persons from falsely assuming or pretending to be a deputy sheriff.¹⁵

As authorized by statute, a county coroner may perform the actual duties of a sheriff who has been removed from the conduct of the affairs of the office while being tried on federal charges.¹⁶

Even without a specific rule so providing, courts have the inherent power to appoint an elisor, or process server, upon the default or disqualification of the sheriff or other officers so authorized.¹⁷

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Footnotes

- 1 [Allen v. Fidelity and Deposit Co. of Maryland](#), 515 F. Supp. 1185 (D.S.C. 1981), *aff'd*, 694 F.2d 716 (4th Cir. 1982).
- 2 [Bailey v. Clausen](#), 192 Colo. 297, 557 P.2d 1207 (1976); [Evans v. Hardcastle](#), 339 So. 2d 1150 (Fla. 2d DCA 1976).
- 3 [Young v. Bailey](#), 781 S.E.2d 277 (N.C. 2016).
- 4 [Tanner v. McCall](#), 625 F.2d 1183 (5th Cir. 1980).
- 5 [Mazzo v. Monroe County](#), 58 A.D.2d 1017, 397 N.Y.S.2d 274 (4th Dep't 1977).
- 6 [McAninch v. Crumbley](#), 65 Ohio St. 2d 31, 19 Ohio Op. 3d 225, 417 N.E.2d 1252 (1981).
- 7 [Coley v. Lucas County, Ohio](#), 799 F.3d 530 (6th Cir. 2015) (applying Ohio law).
- 8 [Slack v. Bishop](#), 444 F. Supp. 1161 (W.D. La. 1978).
- 9 [Hanifin v. Andrews](#), 104 Misc. 2d 381, 428 N.Y.S.2d 383 (Sup 1979).
- 10 [Connelly v. Amico](#), 72 Misc. 2d 644, 340 N.Y.S.2d 156 (Sup 1973), *judgment aff'd*, 43 A.D.2d 1016, 353 N.Y.S.2d 1021 (4th Dep't 1974).

- 11 State v. Berry, 391 So. 2d 406 (La. 1980), concurred with in part, dissented from in part, 396 So. 2d 880
 (La. 1981) and writ granted, 423 So. 2d 1146 (La. 1982) (permitting deputy to act as bank security guard).
12 People v. Pina, 72 Cal. App. 3d Supp. 35, 140 Cal. Rptr. 270 (App. Dep't Super. Ct. 1977); Boyer v. St.
 Amant, 364 So. 2d 1338 (La. Ct. App. 4th Cir. 1978), writ denied, 365 So. 2d 1108 (La. 1978).
13 Payne v. Janasz, 711 F.2d 1305, 13 Fed. R. Evid. Serv. 1087 (6th Cir. 1983).
14 Baumgartner v. State, 21 Md. App. 251, 319 A.2d 592 (1974).
15 State v. Alecia, 692 So. 2d 263 (Fla. 5th DCA 1997).
16 Janovich v. Herron, 91 Wash. 2d 767, 592 P.2d 1096 (1979).
17 Petition of Stoll, 309 So. 2d 190 (Fla. 1st DCA 1975).

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V. Powers and Duties

§ 34. United States marshals and their deputies

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  77 to 88, 93 to 96, 103, 114 to 118

The duties of a United States marshal include both the execution of lawful process and orders of the courts of the United States and the general enforcement, maintenance, and administration of federal authority in the discharge of which duties the marshal acts concurrently as an officer of the federal judiciary and as an executive officer.¹

United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.²

It is the duty of a United States marshal to execute all lawful writs, process, and orders issued under authority of the United States, and command all necessary assistance to execute their duties,³ and to make such reports, and be subject to such direction and supervision, as the Attorney General directs.⁴ Since in the statutory scheme, the office of marshal exists as an arm of the office of Attorney General, a commitment to the marshal can only be construed as a commitment to the Attorney General.⁵

A United States marshal may be authorized by the Attorney General to appoint deputies.⁶

The practice of law by a United States marshal or a deputy marshal is prohibited.⁷

A United States marshal also has certain powers relating to:

- serving or causing to be served, subpoenas in connection with certain Congressional proceedings and investigations;⁸
- accepting the release of prisoners and delivering prisoners;⁹

- designating secure location for visitation of a child of a protected witness;¹⁰
- implementing a death sentence;¹¹
- furnishing a probationer with transportation;¹²
- the arrest and return of probationers;¹³
- temporary safe-keeping of federal offenders;¹⁴
- furnishing to arrested but unconvicted persons released with transportation and subsistence to the place of arrest, or to place of bona fide residence;¹⁵
- furnishing to persons released pending further judicial proceedings with cost of transportation to place of appearance and for subsistence expenses;¹⁶
- delivering arrested individuals to other states or jurisdictions;¹⁷
- serving notices for production in customs proceedings;¹⁸
- taking delivery of property forfeitable under the Internal Revenue Code;¹⁹
- disposition of perishable goods under Internal Revenue Code forfeiture provisions;²⁰
- attending Tax Court proceedings when requested to do so by a chief judge;²¹
- employment by United States marshals of bailiffs in district courts;²²
- payment of district court witness fees and mileage;²³
- serving process in an interpleader action in federal district court;²⁴
- serving civil investigation claims under the Federal False Claims Act;²⁵
- attending United States Court of Appeals for Veterans Claims proceedings when requested to do so by the chief judge;²⁶
- prosecuting the violation of certain laws;²⁷
- taking possession of mortgaged vessels in civil actions;²⁸
- serving process generally,²⁹ as well as serving process in contempt proceedings in the court of Federal Claims,³⁰ and Court of International Trade;³¹
- serving and execution of writs, process, or similar directives of the Tax Court³² as well as service of a subpoena in Tax Court proceedings.³³

The Director of the United States Marshals Service has a duty to consult with the Judicial Conference of the United States on a continuing basis regarding the security requirements for the judicial branch of the U.S. government.³⁴

Footnotes

- 1 U.S. v. Krapf, 285 F.2d 647 (3d Cir. 1960).
- 2 18 U.S.C.A. § 3053.
- 3 28 U.S.C.A. § 566.
- 4 28 U.S.C.A. § 566.
- 5 U.S. v. Howard, 545 F.2d 1044 (6th Cir. 1976).
- 6 28 U.S.C.A. § 562.
As to appointment of deputy marshals, generally, see § 5.
- 7 28 U.S.C.A. § 568.
- 8 2 U.S.C.A. § 190m.
- 9 18 U.S.C.A. §§ 3142(i)(4), 3149, 3552, 3621.
- 10 18 U.S.C.A. § 3524(c).
- 11 18 U.S.C.A. §§ 3596(a), 3597.
- 12 18 U.S.C.A. § 3604.
- 13 18 U.S.C.A. § 3606.
- 14 18 U.S.C.A. § 4086.
- 15 18 U.S.C.A. § 4282.
- 16 18 U.S.C.A. § 4285.
- 17 18 U.S.C.A. § 5001.
- 18 19 U.S.C.A. § 535.
- 19 26 U.S.C.A. § 7322.
- 20 26 U.S.C.A. § 7324.
- 21 26 U.S.C.A. § 7456.
- 22 28 U.S.C.A. § 755.
- 23 28 U.S.C.A. § 1825.
- 24 28 U.S.C.A. § 2361.
- 25 31 U.S.C.A. § 3733(c).
- 26 38 U.S.C.A. § 7265(b).
- 27 42 U.S.C.A. § 1987.
- 28 46 U.S.C.A. § 31325(e)(2).
- 29 Fed. R. Civ. P. 4.1.
- 30 Rules of Court of Federal Claims Rule 4.1.
- 31 Rules of the United States Court of International Trade Rule 4(c)(1), 4.1.
- 32 Tax Ct. R. 21(b)(3); 26 U.S.C.A. foll. § 7453.
- 33 Tax Ct. R. 147(c); 26 U.S.C.A. foll. § 7453.
- 34 28 U.S.C.A. § 566(i).
As to the Judicial Conference of the United States, see [Am. Jur. 2d, Federal Courts](#) §§ 15, 39; [Am. Jur. 2d, Judicial Councils and Conferences](#) §§ 1 to 3.

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V. Powers and Duties

§ 35. Constables

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  77 to 88, 93 to 96, 103, 114 to 118

The constable's duties are to be vigilant to preserve the peace, to prevent the commission of crime, to arrest all offenders in the constable's town who might be arrested without warrant, and to procure warrants in other instances where crime has been committed.¹ A constable's duties may be limited by statute to function as officers of the court or other judicial body and as officers in nonjudicial proceedings authorized by law.² Other statutes may expressly enumerate the duties of a constable as, for example, to be:

- (1) to attend the circuit court of the county when summoned by the sheriff for that purpose;
- (2) to execute and return all summons, executions, and other process directed by any lawful authority;
- (3) to pay over moneys collected by virtue of the constable's office to the person entitled to them;
- (4) to attend the sessions of the justices' courts in the constable's precinct; and
- (5) to perform such other duties as are, or may be, required of the constable by law.³

The duty of constables to execute and return civil process is conditioned upon direction by lawful authority.⁴

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Footnotes

- ¹ [State v. Thyfault](#), 121 N.J. Super. 487, 297 A.2d 873 (County Ct. 1972), *aff'd*, 126 N.J. Super. 459, 315 A.2d 424 (App. Div. 1974).
- ² [Harriatt v. Lillo](#), 452 F. Supp. 421 (D.N.J. 1978).
- ³ [In re Ingram](#), 356 So. 2d 618 (Ala. 1978).

4 [In re Ingram, 356 So. 2d 618 \(Ala. 1978\).](#)

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 36

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V. Powers and Duties

§ 36. Persons to whom duty owed; public duty

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  86

The duty to preserve the peace and protect the public welfare is owed to the public at large and not to particular individuals.¹ Similarly, in investigating a crime, there is no special duty owed to the victim² or to the arrestee;³ rather, the duty owed is to the general public. Thus, for example, the sheriff owes no legal duty to a resident whose home is entered by deputies in an effort to execute an arrest warrant for another individual; the duty is owed to the public at large and not to any individual or, more specifically, the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them.⁴ The responsibility to enforce the laws for the good of the public cannot engender a duty to act with care toward any one individual unless an official assumes a special duty with regard to that person.⁵

A special tort duty does arise, however, when law enforcement officers become directly involved in circumstances that place people within a zone of risk by creating or permitting dangers to exist, by taking persons into police custody, detaining them, or otherwise subjecting them to danger.⁶ A special relationship has been held to exist between a deputy sheriff and the persons in a hospital emergency room, so that the deputy owes a duty to those persons to exercise reasonable care to control the movements of an arrestee, where the deputy's action in taking the arrestee to the hospital emergency room creates a foreseeable zone of risk to those persons forced to occupy the emergency room, particularly in light of such factors as the arrestee's relative youth, the minor nature of the arrestee's injury, any prior escape attempts, and the arrestee's in-custody status.⁷

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Footnotes

¹ [Griffin v. Rogers](#), 232 Kan. 168, 653 P.2d 463 (1982); [Zavala v. Zinser](#), 123 Mich. App. 352, 333 N.W.2d 278 (1983), decision aff'd, 420 Mich. 567, 363 N.W.2d 641, 23 Ed. Law Rep. 671 (1984); [Barratt v. Burlingham](#), 492 A.2d 1219 (R.I. 1985).

² [Crouch v. Hall](#), 406 N.E.2d 303 (Ind. Ct. App. 1980) (police).

- 3 [Milanese v. City of Boca Raton, 84 So. 3d 339 \(Fla. 4th DCA 2012\).](#)
- 4 [Wyatt v. Fowler, 326 S.C. 97, 484 S.E.2d 590 \(1997\).](#)
- 5 [Pollock v. Florida Dept. of Highway Patrol, 882 So. 2d 928 \(Fla. 2004\).](#)
- 6 [Pollock v. Florida Dept. of Highway Patrol, 882 So. 2d 928 \(Fla. 2004\).](#)
- 7 [Sams v. Oelrich, 717 So. 2d 1044 \(Fla. 1st DCA 1998\).](#)

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 37

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V. Powers and Duties

§ 37. Extraterritorial exercise of powers

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West's Key Number Digest

West's Key Number Digest, [Municipal Corporations](#) 🔑 268

West's Key Number Digest, [Sheriffs and Constables](#) 🔑 82

Sheriffs ordinarily are limited to the territorial boundaries of their jurisdictions.¹ However, in some states, a police officer's jurisdiction is statewide and police officers are responsible for enforcing the law at any time, anywhere in the state.²

A statute may authorize law enforcement officers to operate outside their primary jurisdiction when they have authority, such as under an interlocal agreement or contract for joint law enforcement services providing that a law enforcement officer has the power and authority to enforce the laws of the state and of the political subdivision that employs the officer, or otherwise perform the functions of that office anywhere within the officer's primary jurisdiction.³ Such a statute may contemplate and condone extraterritorial activity in response to specifically identified criminal behavior that occurs within the primary jurisdiction of the police.⁴

Officers may be granted jurisdiction to both conduct investigations and arrest offenders anywhere within the county.⁵ Statute may also grant particular peace officers differing levels of extraterritorial jurisdiction based on different qualifications of the officers.⁶

Observation:

A statute defining a police district and a statute allowing the police of any municipality in a police district to go into any part of the district to exercise authority and power, and allowing the mayor and police chiefs of any municipality in a district to use police forces under their control anywhere in the district, does not disenfranchise or dilute the power of the voters of a municipality in

which a defendant is arrested by an adjoining municipality's police officer. Such a statute does not violate due process or equal protection because there is no direct electoral connection between the voting public of a municipality and its patrol officers. A defendant, or a citizen of a municipality, can lobby elected representatives in a state legislature to repeal such a statute.⁷

A police officer who is responding to a request from a county sheriff for assistance at the scene of an accident in an unincorporated portion of a county exercises the same powers as the sheriff and therefore has authority outside of the officer's municipal jurisdiction to detain and arrest a defendant.⁸

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Footnotes

- 1 [Cozzo v. Tangipahoa Parish Council—President Government](#), 279 F.3d 273 (5th Cir. 2002) (applying Louisiana law); [Com. v. Lahey](#), 80 Mass. App. Ct. 606, 954 N.E.2d 1131 (2011).
- 2 [People v. Mahncke](#), 34 Misc. 3d 10, 935 N.Y.S.2d 440 (App. Term 2011) (officer with city's environmental police force stopping erratic driver); [Barton v. City of New York](#), 15 Misc. 3d 504, 831 N.Y.S.2d 882 (Sup 2007).
- 3 [State v. Ohlrich](#), 20 Neb. App. 67, 817 N.W.2d 797 (2012).
- 4 [Com. v. Hilliar](#), 2008 PA Super 22, 943 A.2d 984 (2008).
- 5 [Landrum v. State](#), 751 S.W.2d 530 (Tex. App. Dallas 1988), petition for discretionary review refused, 795 S.W.2d 205 (Tex. Crim. App. 1990).
- 6 [State v. Beattie](#), 157 Vt. 162, 596 A.2d 919 (1991) (detailing grant of extraterritorial jurisdiction to sheriffs' deputies).
- 7 [People v. Barwig](#), 334 Ill. App. 3d 738, 268 Ill. Dec. 364, 778 N.E.2d 350 (5th Dist. 2002).
- 8 [People v. DeBlicke](#), 181 Ill. App. 3d 600, 130 Ill. Dec. 321, 537 N.E.2d 388 (2d Dist. 1989).

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§ 38. Effect of expiration of term of office

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Although it is generally true that a public official may not bind a successor to a contract extending beyond the official's term of office, a public contract may extend beyond the term of a peace officer executing it if there is a clearly expressed legislative intent to grant such power.¹

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Footnotes

¹ [Reese v. Lombard, 47 A.D.2d 327, 366 N.Y.S.2d 493 \(4th Dep't 1975\).](#)

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 39

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V. Powers and Duties

§ 39. Power to summon aid; posse comitatus

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West's Key Number Digest, [Sheriffs and Constables](#)  77 to 88, 93 to 96, 103, 114 to 118

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[Propriety of Police Action Involving Application of Choke Hold, Constriction of Throat, or the Like to Prevent Accused from Swallowing Evidence—State Cases, 64 A.L.R.5th 741](#)

The duty of a peace officer to protect a crime victim is usually discretionary¹ unless and until such time as the officer assumes a duty to accompany or send the crime victim into an area which the officer knows or has reason to know may be dangerous.²

Under common law, the right to organize a posse was limited to the county sheriff,³ and, although a private person may have authority to make certain types of arrests, no authority exists permitting a private person to organize a posse.⁴ There are now some statutes that delineate the use of the posse comitatus which have affirmed⁵ or supplemented⁶ the common law.⁷

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Footnotes

- ¹ [Losinski v. County of Trempealeau, 946 F.2d 544 \(7th Cir. 1991\) \(applying Wisconsin law\).](#)
As to the duty of the sheriff to protect the public as one owed to the public generally, and not to individuals, see [§ 31](#).

- 2 [Losinski v. County of Trempealeau](#), 946 F.2d 544 (7th Cir. 1991) (applying Wisconsin law; reasonable inference arose that deputy knew of "no contact" temporary restraining order and had been warned of husband's dangerous propensities).
- 3 [Linehan v. Rockingham County Com'rs](#), 151 N.H. 276, 855 A.2d 1271 (2004).
- 4 [U.S. v. Hart](#), 545 F. Supp. 470 (D.N.D. 1982), judgment aff'd, 701 F.2d 749 (8th Cir. 1983).
- 5 [Jackson v. State](#), 572 P.2d 87 (Alaska 1977).
- 6 [Scott v. Vandiver](#), 476 F.2d 238 (4th Cir. 1973).
- 7 As to the federal Posse Comitatus Act, which penalizes anyone who, except in cases and under circumstances expressly authorized by the Constitution or an Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws, see [Am. Jur. 2d, Military and Civil Defense §§ 12, 13](#).

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§ 40. Execution of process; levy on property

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  114 to 118

Forms

Forms Regarding Sheriffs' Bonds, see Am. Jur. Legal Forms 2d, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

In general, a sheriff is the proper officer to execute all writs returnable to court unless another person is appointed by special order for that purpose.¹ As between multiple jurisdictions, police officers of a municipality, or a specially appointed bailiff, are generally to serve all process of a city court within the municipal city limits, and the sheriff is authorized to serve the process outside of the city limits.²

When a writ is placed in the hands of a sheriff or marshal it is such officer's duty, in the absence of any instructions to the contrary, to proceed with reasonable celerity and promptness to execute it in accordance with its mandates.³ However, when a lack of authority is apparent from the process, the sheriff is justified, and it is the sheriff's duty, not to serve illegal process, and if the sheriff does so, it is at the sheriff's own peril.⁴

The speed required of a sheriff in executing a writ may depend upon the nature of the writ in question; thus, although reasonable diligence is sufficient for the sheriff executing a levy upon property, it has been held that the sheriff must execute a writ of assistance (one under which the purchaser at an execution sale may obtain possession of the property) at the earliest possible moment after receiving it.⁵

State law governs the procedure United States marshals must use on execution as regards return of execution.⁶

The duty of a sheriff to do an act which is sought by a writ is plain, unequivocal, and ministerial, and ordinarily, the discharge of this duty is not in any way referable to the sheriff's discretion.⁷ A sheriff is subject to severe penalties for failing to carry out an execution, and, in addition to other statutory penalties, a sheriff has been held liable for the whole amount of the execution upon failing or refusing to levy it.⁸

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Footnotes

- 1 [Liquifin Aktiengesellschaft v. Brennan](#), 446 F. Supp. 914 (S.D. N.Y. 1978); [Daniels v. Hanson](#), 115 N.H. 445, 342 A.2d 644 (1975).
- 2 [City of Wabash v. Wabash County Sheriff's Dept.](#), 562 N.E.2d 1299 (Ind. Ct. App. 1990).
- 3 [Cardenas v. Noren](#), 235 Cal. App. 3d 1344, 1 Cal. Rptr. 2d 367 (6th Dist. 1991); [Grant v. Credithrift of America, Inc.](#), 402 So. 2d 486 (Fla. 1st DCA 1981).
- 4 [Cardenas v. Noren](#), 235 Cal. App. 3d 1344, 1 Cal. Rptr. 2d 367 (6th Dist. 1991).
- 5 [City of Chicago v. Walker](#), 61 Ill. App. 3d 1050, 18 Ill. Dec. 578, 377 N.E.2d 1214 (1st Dist. 1978).
- 6 [Fed. R. Civ. P. 69\(a\)](#).
For thorough discussion of executions under the federal rule, see Am. Jur. 2d, Executions and Enforcement of Judgments[[Westlaw®\(r\) Search Query](#)].
- 7 [Ritter v. Castellini](#), 173 N.J. Super. 509, 414 A.2d 614 (Law Div. 1980).
- 8 §§ 49 to 51.

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West's Key Number Digest, [Sheriffs and Constables](#)  28 to 76

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A.L.R. Index, Compensation

A.L.R. Index, Constables

A.L.R. Index, Deputies

A.L.R. Index, Marshals

A.L.R. Index, Police and Law Enforcement Officers

A.L.R. Index, Public Officers and Employees

A.L.R. Index, Sheriffs

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 41

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VI. Compensation

§ 41. Compensation of sheriffs, deputies, and constables, generally

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West's Key Number Digest, [Sheriffs and Constables](#)  28 to 76

The right of a sheriff or other peace officer to compensation is largely statutory; such statutes, being in derogation of the common law, are strictly construed.¹ In some cases, the right of a sheriff or other peace officer to compensation may be governed by a state constitutional provision.² Such provisions may delegate the authority to fix the actual amount of compensation to various local authorities, such as the district court or the county government.³ However, such a delegation of authority to determine salaries does not extend beyond this express function.⁴

Insofar as the compensation of deputy sheriffs is concerned, in the absence of express language to the contrary, the construction of a local act providing for the appointment of deputies by the sheriff and the payment of salaries to the deputies must be that the legislature intended that the sheriff set the salaries of deputies.⁵ The announcement by a sheriff that all deputies will receive a certain wage constitutes an offer which becomes a contract when the deputies accept that offer by continuing to work.⁶ Deputy sheriffs are not entitled to compensation for "on-call" time where such on-call time requires no physical or mental exertion; availability for work does not automatically translate into compensable "work" time under any common understanding of the term.⁷

An officer directed to perform the work of a higher job classification is eligible for the compensation of the higher classification if the officer is officially designated to temporarily fill a vacant position or if the officer is called upon to perform the duties of the position.⁸

A sheriff who also acts as a tax collector is a fiduciary for the funds and must account for the interest on them.⁹ A deputy sheriff is not entitled to retain accumulated interest on a deposit made pursuant to statute.¹⁰

Observation:

The receipt of nondeferred wages by officers in a sheriff's department may be a protected property interest; nevertheless, procedural due process was not violated by a county's unilateral imposition of a pay lag. The officers' association was provided with predeprivation notice of the lag procedure whereby 10 days of each officer's pay would be deferred over the course of 10 biweekly pay periods with the deferred pay returned when the officer separated from service with the county. A collective bargaining agreement's grievance procedures were adequate to remedy any potential right the officers possessed to not have their pay lagged.¹¹

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Footnotes

- 1 [Klein v. Pima County Law Enforcement Merit System Council](#), 119 Ariz. 69, 579 P.2d 573 (Ct. App. Div. 2 1978); [Janisch v. La Porte County](#), 161 Ind. App. 226, 315 N.E.2d 387 (1974); [International Broth. of Elec. Workers, Local No. 1470 v. Gillen](#), 174 N.J. Super. 326, 416 A.2d 446 (App. Div. 1980); [Overton County v. State ex rel. Hale](#), 588 S.W.2d 282 (Tenn. 1979).
As to the rights of public officers to compensation generally, and the rules governing such compensation, see Am. Jur. 2d, Public Officers and Employers.[\[Westlaw®\(r\) Search Query\]](#)
- 2 [Cardunal Sav. & Loan Ass'n v. Kramer](#), 99 Ill. 2d 334, 76 Ill. Dec. 794, 459 N.E.2d 929 (1984); [Redwine v. State](#), 649 So. 2d 61 (La. Ct. App. 1st Cir. 1994), as amended on reh'g, (Feb. 2, 1995) (constitutional provision may not be avoided by failure of legislature to make appropriation); [Ector County v. Stringer](#), 843 S.W.2d 477 (Tex. 1992).
- 3 [La Brosse v. Board of Com'rs, Boundary County](#), 105 Idaho 730, 672 P.2d 1060 (1983) (county commissioners); [Linehan v. Rockingham County Com'rs](#), 151 N.H. 276, 855 A.2d 1271 (2004); [Ector County v. Stringer](#), 843 S.W.2d 477 (Tex. 1992) (commissioner's court).
- 4 [Garcia v. Reeves County, Tex.](#), 32 F.3d 200 (5th Cir. 1994) (applying Texas law; once county commissioners court sets number and salary of sheriff's office employees, it may not attempt to influence appointment of any person to employee position, nor change employee's status from "at will" to other classification).
- 5 [Warren v. Walton](#), 231 Ga. 495, 202 S.E.2d 405 (1973).
- 6 [Scutt v. LaSalle County Bd.](#), 97 Ill. App. 3d 181, 53 Ill. Dec. 21, 423 N.E.2d 213 (3d Dist. 1981) (an announcement by a sheriff that all deputies would receive a \$1,000 raise constituted an offer to work for the revised wage).
- 7 [Phillips v. Lake County](#), 222 Mont. 42, 721 P.2d 326 (1986); [City of University Park v. University Park Police Ass'n](#), 766 S.W.2d 531 (Tex. App. Dallas 1989), writ denied, (Sept. 13, 1989) (applying rule to overtime pay).
- 8 [Mokwa v. City of Houston](#), 741 S.W.2d 142 (Tex. App. Houston 1st Dist. 1987), writ denied, (Jan. 27, 1988).
- 9 [Amiss v. State](#), 340 So. 2d 1085 (La. Ct. App. 1st Cir. 1976).
- 10 [Kaltas v. Layden](#), 1992 Mass. App. Div. 160, 1992 WL 185704 (1992).
- 11 [Adams v. Suozzi](#), 517 F.3d 124 (2d Cir. 2008) (concerning officers in Nassau County, Long Island).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 42

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§ 42. Elements of compensation

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  28 to 30

Under the statutes of some jurisdictions, the sheriff is entitled to receive both a salary and certain fees as compensation.¹ Others permit the sheriff to retain only salary; the fees are considered the property of the county.² Similarly, statutes may empower county officials to establish salaries for constables, and to establish their entitlement to certain fees, or to a percentage of such fees.³

Such statutes may prescribe the salary to be paid to the sheriff or to sheriff's deputies according to the population of the county served,⁴ which may be in lieu of all other fees, commissions, and other forms of compensation.⁵ Such acts providing for population brackets and prescribing the salary of the sheriff of each county according to the population classification into which each county falls have been held proper, the difference in salary being reasonably related to the difference in population.⁶

A sheriff's deputy who is wrongfully discharged or suspended is entitled to back pay.⁷

A statute referring to an "annual salary increase," as used in setting forth a method for determining pay increases for deputy sheriffs, could mean an increase in salary that becomes a part of the base salary or a salary increase that is nothing more than a bonus; because of this dual possibility of interpretation, the statute is ambiguous.⁸ Statute may mandate that deputy sheriffs be paid no less than state troopers in which event the statute is deemed to mandate an increase in deputies' salaries when the state raises trooper salaries.⁹

Observation:

Where there is a clear duty imposed on a body, such as a court,¹⁰ to determine increases in salary for peace officers, then mandamus is the proper vehicle to require the body to make that determination.¹¹

A county is not required to provide constables with office space, a secretary, an automobile, and expenses to maintain the office where it finds such to be unnecessary.¹²

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Footnotes

- 1 [Town of Stowe v. Lamoille County](#), 134 Vt. 402, 362 A.2d 159 (1976).
Statutes regarding the compensation of sheriffs and deputy sheriffs do not require that the sheriff and deputies be paid either by fees or by a salary from a county's general fund in lieu of fees. [People v. Van Tubbergen](#), 249 Mich. App. 354, 642 N.W.2d 368 (2002).
As to statutory fees collected by a sheriff generally, see § 44.
- 2 [Liquifin Aktiengesellschaft v. Brennan](#), 446 F. Supp. 914 (S.D. N.Y. 1978).
- 3 [Langon v. Washoe County](#), 116 Nev. 115, 993 P.2d 718 (2000).
- 4 [Freeman v. Purvis](#), 400 So. 2d 389 (Ala. 1981).
- 5 [Hamilton v. Autauga County](#), 289 Ala. 419, 268 So. 2d 30 (1972).
- 6 [Hamilton v. Autauga County](#), 289 Ala. 419, 268 So. 2d 30 (1972).
- 7 [Lauderdale County v. Daniels](#), 431 So. 2d 1266 (Ala. 1983).
- 8 [Adkins v. Merow](#), 202 W. Va. 492, 505 S.E.2d 406 (1997).
- 9 [Tuscaloosa County Com'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County](#), 589 So. 2d 687 (Ala. 1991).
- 10 [In re Bailey](#), 975 S.W.2d 430 (Tex. App. Waco 1998) (finding no clear duty, so that mandamus would not lie).
- 11 [Ector County v. Stringer](#), 843 S.W.2d 477 (Tex. 1992) (mandamus proceeding against commissioners court).
- 12 [Gregory v. Thompson](#), 159 Ariz. 512, 768 P.2d 674 (Ct. App. Div. 2 1989).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 43

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VI. Compensation

§ 43. Elements of compensation—Overtime pay; compensatory time off

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West's Key Number Digest

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A peace officer is not entitled to claim overtime in the absence of a statute¹ or contract provision² authorizing it. A collective-bargaining agreement applicable to the public officers working the overtime hours may provide sufficient authorization for the compensation for their overtime duties.³ Where qualified as "employees" of the county, overtime compensation may also be limited by regulations applying to county employees generally.⁴

Caution:

Although a sheriff and county commission have the right to determine the administrative procedures for their offices, including the methods for controlling and approving overtime, the procedures may not violate wage and hour statutes insofar as they relate to the deputy sheriffs' entitlement to overtime.⁵

Statutes authorizing the payment of overtime are mandatory only in the sense that the named employees, such as deputy sheriffs, may be compensated for overtime work, but the statute does not mandate the payment of overtime from funds neither budgeted nor appropriated to the sheriff's department when the funds which have been budgeted for the department prove insufficient.⁶ Some statutes, while authorizing compensation for overtime hours worked, impose limitations upon it.⁷ Others forbid the payment of overtime pay, and permit only that the equivalent time may be taken off⁸ or expressly delegate the issue to be

decided at the county level.⁹ Once authorized by the county, however, such provision for overtime compensation becomes an element of the peace officer's contract.¹⁰

Observation:

Even where a county commissioner's court possesses the authority to determine the number of sheriff's deputies to be appointed and their compensation, to the extent that the sheriff has the absolute right to determine the persons to be appointed, then such a court lacks the authority to suspend or terminate the deputies for alleged violations of the overtime policy.¹¹

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Footnotes

- 1 [Geneva County Com'n v. Tice](#), 578 So. 2d 1070 (Ala. 1991); [Rusk v. Whitmire](#), 91 Nev. 689, 541 P.2d 1097 (1975).
- 2 [Rusk v. Whitmire](#), 91 Nev. 689, 541 P.2d 1097 (1975).
A sheriff's department memorandum and the representations of a department employee do not authorize the payment of one and one-half times deputies' rate of pay for overtime. [Venhaus v. Adams](#), 295 Ark. 606, 752 S.W.2d 20 (1988).
- 3 [Rusk v. Whitmire](#), 91 Nev. 689, 541 P.2d 1097 (1975) (deputy had worked 357 hours of overtime for which he had not received compensatory time off); [Brown v. Jimerson](#), 1980-NMSC-125, 95 N.M. 191, 619 P.2d 1235 (1980).
- 4 [Linehan v. Rockingham County Com'rs](#), 151 N.H. 276, 855 A.2d 1271 (2004).
- 5 [Pijanowski v. Yuma County](#), 202 Ariz. 260, 43 P.3d 208 (Ct. App. Div. 1 2002); [McCarty v. Harless](#), 181 W. Va. 719, 384 S.E.2d 164 (1989).
- 6 [Geneva County Com'n v. Tice](#), 578 So. 2d 1070 (Ala. 1991); [Venhaus v. Adams](#), 295 Ark. 606, 752 S.W.2d 20 (1988).
Any overtime owed deputy sheriffs would be paid first from sheriff's budget until exhausted and then by county commission; sheriff and county commission were joint employers had legal duty to pay overtime properly performed and reported. [Trumka v. Ashworth](#), 183 W. Va. 319, 395 S.E.2d 563 (1990).
- 7 [Markman v. County of Los Angeles](#), 35 Cal. App. 3d 132, 110 Cal. Rptr. 610 (2d Dist. 1973) (monetary payment for overtime was permitted only if authorized by the chief county officer in advance).
- 8 [Longshore v. County of Ventura](#), 25 Cal. 3d 14, 157 Cal. Rptr. 706, 598 P.2d 866 (1979).
- 9 [Armstrong v. Harris County](#), 669 S.W.2d 323 (Tex. App. Houston 1st Dist. 1983), writ refused n.r.e., (July 18, 1984).
- 10 [Conway v. Board of County Com'rs of Grand Forks County, N.D.](#), 349 N.W.2d 398 (N.D. 1984); [Oswald v. Aiken County](#), 281 S.C. 298, 315 S.E.2d 146 (Ct. App. 1984).
- 11 [Commissioners Court of Shelby County v. Ross](#), 809 S.W.2d 754 (Tex. App. Tyler 1991).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 44

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§ 44. Elements of compensation—Fees

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West's Key Number Digest

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Aside from the compensation provided for the sheriff, constable, or other peace officer for the performance of official duties in the form of salaries,¹ certain fees may be prescribed for the performance of specified duties by the officer. For example, a sheriff may charge mileage for each unsuccessful attempt to serve process as well as a single service fee for actually effecting service.² However, a sheriff does not have authority to charge a fee which is not established by, or in addition to, statutory fees³ and may be mandated to return fees where the service for the fee is not actually performed.⁴

Observation:

A sheriff's conduct in charging excess service of process fees, fee splitting, and using subordinate employees to further such practices may be illegal.⁵

The statutes providing for fees for the rendition of various services may distinguish closely between different types of fees allowable for the acts performed by various peace officers.⁶

The sheriff's fee for collection on execution after levy may be mandated to be calculated on the value of the property on which the sheriff actually levied, not on the settlement amount.⁷ However, a sheriff may only be entitled to collect a statutory commission

from a creditor for services performed during the pendency of a proceeding based on the amount actually received by the creditor as anything more could be deemed a windfall to the sheriff and serve as a penalty to the creditor.⁸

The fees to which a United States marshal are entitled are set forth by federal statute. The statute has established a uniform commission for the marshal's services in regard to all property disposed of through court-ordered sale. The statute further provides that if the property seized or levied on is not disposed of by marshal's sale, the commission shall be in such amount as may be allowed by the court.⁹

The statute also specifies the fees for the other services provided by United States marshals.¹⁰

The marshal may require a deposit to cover all fees and expenses prescribed in the statute.¹¹

The moneys collected by marshals as fees are paid to the federal treasury.¹²

Poundage is a fee awarded to the sheriff in the nature of a percentage commission upon moneys recovered pursuant to a levy or execution of attachment.¹³ The basis of poundage is the amount the sheriff collects,¹⁴ thus, where no amount is collected, no poundage is owed, except where a settlement is made after a levy by virtue of an execution,¹⁵ or where an execution is vacated or set aside.¹⁶ Additionally, a judgment debtor is liable to a sheriff for poundage fees for its affirmative interference with the sheriff's collection efforts.¹⁷

A statute that provides for a refund of the full fee where the sheriff is unable to serve a paper is applicable only when service of a paper is involved and requires a refund only when that cannot be accomplished.¹⁸

Statute will typically identify and determine the circumstances under which a particular person is required to pay a sheriff's fee although such circumstances are not unique.¹⁹ In certain instances, such as sheriff's sales, a court may have authority to determine the amount of the fee and the party to whom the fee will be assessed.²⁰

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Footnotes

- 1 § 42.
- 2 FCC Nat. Bank v. Sheriff Monmouth County, 343 N.J. Super. 609, 779 A.2d 476 (Law Div. 2001).
- 3 Campbell v. White, 294 Ark. 656, 746 S.W.2d 42 (1988); Rioux v. State Ethics Com'n, 45 Conn. Supp. 242, 709 A.2d 613 (Super. Ct. 1997), judgment aff'd, 48 Conn. App. 214, 706 A.2d 1390 (1998); Salem Sales, Inc. v. Brown, 443 N.W.2d 14 (S.D. 1989).
- 4 Schuman, Kane, Felts & Everngam, Chartered v. Aluisi, 341 Md. 115, 668 A.2d 929 (1995).
- 5 Rioux v. State Ethics Com'n, 45 Conn. Supp. 242, 709 A.2d 613 (Super. Ct. 1997), judgment aff'd, 48 Conn. App. 214, 706 A.2d 1390 (1998).
- 6 As to criminal liability, see §§ 156 to 160.
- 7 International Broth. of Elec. Workers, Local No. 1470 v. Gillen, 174 N.J. Super. 326, 416 A.2d 446 (App. Div. 1980).
- 8 Billigmeier v. Hennepin County, 428 N.W.2d 79 (Minn. 1988).
- 9 U.S. v. Carrington, 640 So. 2d 659 (La. Ct. App. 3d Cir. 1994); Jacoby v. Eseo, 329 N.J. Super. 119, 746 A.2d 1069 (App. Div. 2000).
- 10 28 U.S.C.A. § 1921.
- 11 28 U.S.C.A. § 1921 (specific sums as fees which are to be collected and taxed as costs for serving a writ, order, or process; for serving of a subpoena or summons for a witness or appraiser; for forwarding of a writ,

order, or process; for preparation of a notice of sale; for seizing or levying on property and disposing thereof; for the keeping of property attached; and for other expenses).

11 28 U.S.C.A. § 1921.

12 28 U.S.C.A. § 572(a).

13 *Alvarez v. Brooklyn Hospital-Caledonian Hosp.*, 255 A.D.2d 278, 679 N.Y.S.2d 408 (2d Dep't 1998).

Poundage may be assessed based on the amount paid to settle or stay the writ. *Ashbridge Oil Co., Inc. v. Irons*, 123 Pa. Commw. 629, 554 A.2d 629 (1989).

14 *Pennsylvania Bank & Trust Co. v. Hanisek*, 426 F. Supp. 410 (W.D. Pa. 1977).

15 *Alvarez v. Brooklyn Hospital-Caledonian Hosp.*, 255 A.D.2d 278, 679 N.Y.S.2d 408 (2d Dep't 1998); *Kinder-Travel, Inc. ex rel. Kid Country Junction, Inc. v. Estill*, 2003 PA Super 384, 834 A.2d 1175 (2003).

16 *Alvarez v. Brooklyn Hospital-Caledonian Hosp.*, 255 A.D.2d 278, 679 N.Y.S.2d 408 (2d Dep't 1998).

17 *Martin v. Consolidated Edison Co. of New York, Inc.*, 177 A.D.2d 548, 576 N.Y.S.2d 290 (2d Dep't 1991).

18 *Schuman, Kane, Felts & Everngam, Chartered v. Aluisi*, 341 Md. 115, 668 A.2d 929 (1995).

19 *Kelley v. Guinn*, 602 So. 2d 165 (La. Ct. App. 3d Cir. 1992).

20 *Fowler v. Fitzgerald*, 82 Md. App. 166, 570 A.2d 866 (1990).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 45

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VI. Compensation

§ 45. Elements of compensation—Compensation for performing duties of more than one office

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  33 to 51

Where salaries or other compensation are provided for those performing the duties associated with more than one office, such as the positions of sheriff and a separate position of jailer, and the holding of both offices or the discharging of such duties do not violate any rule against the holding of more than one office,¹ the sheriff or other peace officer may be entitled to the compensation for both offices.² Similarly, even though a sheriff may be barred from receiving any increase in compensation during the term of office, under a constitutional provision forbidding the increase or decrease of compensation during the term of office, a sheriff may be allowed to receive an increase in fees for the performance of the duties of another office, not covered by the constitutional provision.³ In other cases, however, the application of funds designated as compensation for one of those offices to the other may be impermissible under the applicable statutory or constitutional provisions.⁴

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Footnotes

- ¹ § 10.
- ² [State ex rel. Landanger v. Madison County Bd. of Com'rs, 213 Neb. 33, 327 N.W.2d 93 \(1982\).](#)
- ³ [State ex rel. Landanger v. Madison County Bd. of Com'rs, 213 Neb. 33, 327 N.W.2d 93 \(1982\)](#) (legislature increased from the fees per diem to be paid by the county to the sheriff as jailer when there are prisoners confined in the county jail).
- ⁴ [Special School Dist. of Fort Smith No. 100 v. Sebastian County, 277 Ark. 326, 641 S.W.2d 702, 7 Ed. Law Rep. 1086 \(1982\).](#)

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 46

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VI. Compensation

§ 46. Expenses and disbursements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  61 to 66

Statutes usually provide for the reimbursement of a sheriff or other such officer for expenses necessarily incurred or disbursements necessarily made in the performance of the duties of the office and various expenses incurred by such officers have been held to be necessary and reimbursable.¹ Expenses incurred in traveling,² in storing property seized under a writ,³ in the publication of notices,⁴ and in boarding prisoners⁵ have been included. Expenses which have been held not necessary expenses of the office include expenses for the improper posting of notice of a constable's sale of property⁶ or for the expenses incurred by the officer in defending a criminal prosecution.⁷

Under regulations prescribed by the Attorney General, each United States marshal must be allowed actual and necessary office expenses⁸ and other necessary expenditures in line of duty which are approved by the Attorney General.⁹ The expenses of a United States marshal, incurred for necessary travel in serving or endeavoring to serve any process, writ, or order, and in the keeping of attached property, as well as for other enumerated expenses, may be collected and taxed as costs.¹⁰

An argument by a sheriff, in connection with a request for counsel fees with regard to a budget dispute with county freeholders, that, since jurors and court attendants have an effect on the manner in which the judicial branch functions within the county, the judicial branch had authority to order the legislative branch to provide additional funds for the sheriff's department does not state a cause of action on which judicial relief can be granted.¹¹

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Footnotes

¹ [U.S. v. Harmon](#), 147 U.S. 268, 13 S. Ct. 327, 37 L. Ed. 164 (1893).

² [Murphy-Taylor v. Hofmann](#), 968 F. Supp. 2d 693 (D. Md. 2013) (applying Maryland law).

- 3 Gilbert v. Campise, 432 So. 2d 423 (La. Ct. App. 5th Cir. 1983).
4 Cook v. Jones, 521 S.W.2d 335 (Tex. Civ. App. Dallas 1975), writ refused n.r.e., (July 12, 1975).
5 State ex inf. Ashcroft v. Riley, 590 S.W.2d 903 (Mo. 1979).
6 Rosenwald v. Barbieri, 501 Pa. 563, 462 A.2d 644 (1983).
7 Bablitch and Bablitch v. Lincoln County, 82 Wis. 2d 574, 263 N.W.2d 218 (1978).
8 28 U.S.C.A. § 567.
9 28 U.S.C.A. §§ 567, 568.
10 28 U.S.C.A. § 1921(6) (enumerating expenses and amounts permitted).
11 Simon v. Board of Chosen Freeholders of County of Camden, 281 N.J. Super. 417, 658 A.2d 306 (App. Div. 1995).

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70 Am. Jur. 2d Sheriffs, Police, and Constables VII A Refs.

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VII. Civil Liability

A. In General

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Research References

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  97, 99 to 113(4), 119 to 151

A.L.R. Library

A.L.R. Index, Constables

A.L.R. Index, Deputies

A.L.R. Index, Judicial and Execution Sales

A.L.R. Index, Marshals

A.L.R. Index, Police and Law Enforcement Officers

A.L.R. Index, Process and Service of Process and Papers

A.L.R. Index, Public Officers and Employees

A.L.R. Index, Sheriffs

West's A.L.R. Digest, [Sheriffs and Constables](#)  97, 99 to 113(4), 119 to 151

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 47

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Sheriffs, Police, and Constables

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VII. Civil Liability

A. In General

§ 47. Nature of liability; causation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  97, 99 to 113(4), 119 to 124

A.L.R. Library

[Immunity of public officer from liability for injuries caused by negligently released individual](#), 5 A.L.R.4th 773

Trial Strategy

[Wrongful Death of Minor in Police Custody](#), 69 Am. Jur. Trials 1

A sheriff, constable, or other peace officer often may be held liable in damages to any person injured because of a breach of any of the duties connected with serving in office.¹ For liability to exist, it must appear that the plaintiff's injury resulted from, or was proximately caused by, the officer's breach of duty.² A duty arises when, for example, a police officer decides to assume control over a particular situation or individual or group of individuals; the decision is accompanied by a corresponding duty to exercise reasonable care.³ A deputy's failure to summon an ambulance in conducting a safety check in response to a 911 call is held to the standard of care required of a reasonable law-enforcement officer under like circumstances rather than the standard

of care required of medical personnel.⁴ However, where there is no statutory or common-law authority which places a county sheriff in a supervisory position over the local police, a sheriff cannot be held legally responsible for advice to a police chief.⁵

Observation:

In any civil action against a law enforcement officer resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability.⁶

The liability of a sheriff for nonfeasance, misfeasance, or malfeasance in office is in an individual, not official, capacity, and the complaint must sufficiently plead such individual liability.⁷ Because the liability of a sheriff for negligent acts committed while in the performance of duties is personal, it follows that the personal liability of a former sheriff is not continued or transferred to a successor sheriff.⁸ However, a sheriff's liability for worker's compensation benefits owing to a deputy sheriff is not personal but exists only because of the sheriff's official capacity.⁹

Observation:

When the remedy sought is monetary damages, there can be no [42 U.S.C.A. § 1983](#) claim against peace officers in their official capacities.¹⁰

United States marshals are personally responsible for their own negligent acts.¹¹

When an authority given by law to a sheriff, deputy, or constable is exceeded, it is well-established that the officer loses the benefit of justification and becomes a trespasser ab initio even though to a certain extent the officer follows the authority given.¹² A sheriff or other officer, and those acting with the officer or under the officer's command, may become trespassers ab initio either by using their authority for improper purposes, or by exercising that authority in an improper and illegal manner, to the prejudice of others, even if they acted under valid legal process.¹³

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Footnotes

- 1 [Life & Fire Ins. Co. of New York v. Adams](#), 34 U.S. 573, 9 L. Ed. 234, 1835 WL 3254 (1835); [Clark v. Red Bird Cab Co. \(Red Bird Cab, Inc.\)](#), 114 N.C. App. 400, 442 S.E.2d 75 (1994).

- 2 *Sheets v. Mullins*, 287 F.3d 581, 2002 FED App. 0144P (6th Cir. 2002); *Brooks v. Lundeen*, 49 Ill. App. 3d
1, 7 Ill. Dec. 262, 364 N.E.2d 423 (2d Dist. 1977) (failure to warn of the danger or purpose of a roadblock
intended to stop a vehicle escaping at high speed from pursuing police); *Lindquist v. Moran*, 203 Mont. 268,
662 P.2d 281 (1983); *Clark v. Red Bird Cab Co. (Red Bird Cab, Inc.)*, 114 N.C. App. 400, 442 S.E.2d 75
(1994); *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992).
- 3 *Pollock v. Florida Dept. of Highway Patrol*, 882 So. 2d 928 (Fla. 2004).
- 4 *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).
- 5 *In re Ash*, 113 N.H. 583, 311 A.2d 304 (1973).
- 6 *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547 (1999).
- 7 *Stickney v. State, Missoula County*, 195 Mont. 415, 636 P.2d 860 (1981).
- 8 *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973); *Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Dept.*, 350
So. 2d 236 (La. Ct. App. 3d Cir. 1977), writ denied, 352 So. 2d 235 (La. 1977).
- 9 *Kahl v. Baudoin*, 449 So. 2d 1334 (La. 1984).
- 10 *Lee v. Greene*, 114 N.C. App. 580, 442 S.E.2d 547 (1994).
- As to section 1983 remedies generally, see Am. Jur. 2d, Civil Rights §§ 63 to 171.
- 11 *Wilson v. Bittinger*, 262 F.2d 714 (D.C. Cir. 1958).
- 12 Am. Jur. 2d, Trespass §§ 78, 79.
- 13 *Mica Industries, Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 48

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VII. Civil Liability

A. In General

§ 48. Failure to enforce laws

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  101, 102

A.L.R. Library

[Failure to restrain drunk driver as ground of liability of state or local government unit or officer, 48 A.L.R.4th 320](#)

[Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 A.L.R.3d 700](#)

The duty of a law enforcement officer to preserve the peace and arrest lawbreakers is one which the officer owes to the public generally, rather than to particular individuals,¹ and the breach of such duty creates no liability on the part of the officer to an individual who is damaged as a result of the officer's failure to perform it.² Thus, the courts have generally rejected claims of individuals for personal injury or property damage from the acts of persons committing crimes or violations³ or for not preventing convicted persons from committing additional crimes.⁴ Nor is there liability for failing to enforce a law as a result of which someone else damages or injures the violator.⁵ In such instances, the proximate cause is the perpetrator's subsequent conduct, not the prior failure to arrest.⁶

Liability for a failure to enforce the law may arise, however, upon a showing of malice, oppression in office, or willful misconduct in connection with a failure to enforce the law.⁷ Additionally, liability may be imposed where the peace officer knows of circumstances entitling a person to a greater degree of protection, and hence imposing a greater duty than that afforded

to the public generally, or the officer has control over the place where an attack occurs.⁸ This may be referred to as the "state-created" or "enhanced danger" doctrine.⁹

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Footnotes

- 1 § 31.
- 2 *South v. State of Maryland for use of Pottle*, 59 U.S. 396, 18 How. 396, 15 L. Ed. 433, 1855 WL 8263 (1855); *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982); *Zavala v. Zinser*, 123 Mich. App. 352, 333 N.W.2d 278 (1983), decision aff'd, 420 Mich. 567, 363 N.W.2d 641, 23 Ed. Law Rep. 671 (1984); *Barratt v. Burlingham*, 492 A.2d 1219 (R.I. 1985); *Dent v. City of Dallas*, 729 S.W.2d 114 (Tex. App. Dallas 1986), writ refused n.r.e., (Oct. 14, 1987).
- 3 *Trautman v. City of Stamford*, 32 Conn. Supp. 258, 350 A.2d 782 (Super. Ct. 1975) (failure to arrest drag racers).
- 4 *Clark v. Red Bird Cab Co. (Red Bird Cab, Inc.)*, 114 N.C. App. 400, 442 S.E.2d 75 (1994) (rapist released from jail obtained taxi driver's license and committed rape and murder).
- 5 *McGeorge v. City of Phoenix*, 117 Ariz. 272, 572 P.2d 100 (Ct. App. Div. 1 1977) (parking violator murdered by property owner where parking violation occurred); *Cavigliano v. County of Livingston*, 254 A.D.2d 817, 678 N.Y.S.2d 186 (4th Dep't 1998) (failure to arrest drunk driver who later killed victim while driving).
- 6 *Sarno v. Whalen*, 233 Conn. 524, 659 A.2d 181 (1995); *Tise v. Yates Const. Co., Inc.*, 345 N.C. 456, 480 S.E.2d 677 (1997) (third party acts broke chain of causation); *Dent v. City of Dallas*, 729 S.W.2d 114 (Tex. App. Dallas 1986), writ refused n.r.e., (Oct. 14, 1987).
- 7 *Commercial Union Ins. Co. of New York v. City of Wichita*, 217 Kan. 44, 536 P.2d 54 (1975).
- 8 *Schnurr v. Board of County Com'rs of Jefferson County*, 189 F. Supp. 2d 1105, 163 Ed. Law Rep. 309 (D. Colo. 2001) (applying Colorado law); *Landis v. Rockdale County*, 206 Ga. App. 876, 427 S.E.2d 286 (1992) (failing to arrest drunk minor at scene of one accident may have been proximate cause of injuries at subsequent accident); *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 43 Ill. Dec. 610, 410 N.E.2d 610 (4th Dist. 1980).
- 9 *Schnurr v. Board of County Com'rs of Jefferson County*, 189 F. Supp. 2d 1105, 163 Ed. Law Rep. 309 (D. Colo. 2001) (applying Colorado law; alleged improper responses to armed attack on the school by other students and lack of rescue efforts were not reckless or in conscious disregard of the danger nor with intent to harm students).
A sheriff's failure to be aware of the presence of children at a stable and having as part of a work release program an inmate who had been accused of domestic abuse in a domestic proceeding, which may have disqualified the inmate for the program, was not the cause in fact of a child's injuries in being kicked in the head by a horse at stables, when the inmate was in physical custody of the sheriff and the inmate was working at the horse stables on the day the child was kicked in the head by the horse, and thus, the sheriff could not be independently liable to the child. *Waring v. Travelers Ins. Co.*, 891 So. 2d 119 (La. Ct. App. 4th Cir. 2005), writ denied, 901 So. 2d 1068 (La. 2005).

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VII. Civil Liability

A. In General

§ 49. Return or execution of process; levy on property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  106 to 113(4)

A.L.R. Library

[Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393](#)

Forms

Complaint, petition, or declaration—Against sheriff and county— Conversion by seizure of exempt goods, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables[[Westlaw®\(r\) Search Query](#)]

A sheriff or constable may, under the proper circumstances, be liable by way of statutory penalty or summary proceedings for the making of a false return as respects the service of a summons in an action to acquire personal jurisdiction of the defendant.¹ A constable, who made a false return of a writ of execution was not liable to the judgment creditor for the full amount of the debt, plus interest and costs, but was liable for the lesser of the full amount of the debt or the fair market value of the nonexempt properties owned by the judgment debtor.²

If any officer acting under process is guilty of improper and illegal exercise of that authority, warranting the conclusion that the officer intended to use that authority as a cover for illegal conduct, the officer ordinarily becomes a trespasser ab initio and is liable as if acting without process.³

An officer is liable to the defendant in an execution for an unreasonable and unnecessary levy on the defendant's property; thus, a valid claim against a sheriff for a wrongful execution is stated where the value of the property seized greatly exceeds the monetary judgment awarded.⁴ A sheriff is absolved from liability for excessive levy where the execution in question does not specifically describe property upon which the sheriff was commanded to levy, making applicable the clause of a statute requiring the sheriff to levy upon any property assessed against the defendant on the current tax lists of the county or registered in the sheriff's name.⁵

The law places the burden upon the sheriff to use reasonable care in approving the sureties on a bond; thus, it is not necessary to take exception to the sufficiency of the bond as a prerequisite to causing a sheriff to be liable on the bond for a lack of reasonable care in determining the sufficiency of the sureties.⁶ However, the officer taking the bond is not strictly liable if it proves to be insufficient.⁷

If a sheriff, constable, or marshal levies on the property of a stranger to the writ, the sheriff is liable in damages for this wrong.⁸ Otherwise stated, a peace officer who levies upon property which does not belong to the judgment debtor will be liable for wrongful levy in an action by the owner for the recovery of possession of the property levied upon and may also be held liable for damages for conversion.⁹

An exception to personal liability may exist to the extent that the property is in the possession of the person named in the writ and the peace officer has no actual knowledge or reason to suppose at any time prior to a sale of the property that another person is the true owner.¹⁰

A sheriff must use due care and diligence in determining who the true owner of property is before it is sold to avoid liability for conversion; in the absence of some rule of conduct specifically prescribed by the legislature, the standard of due care is that of an ordinary prudent person under the circumstances.¹¹ However, a sheriff is not under a duty to make a title search when the writ of process presumptively and apparently covers the property attached.¹²

A person acting as a sheriff, who levies upon property which is exempt from execution, will be liable for wrongful levy in an action by the owner for the recovery of possession of the property levied upon, and may also be held liable for damages for conversion.¹³

A peace officer may be held liable for negligent or wrongful acts in the execution of process causing damage to property.¹⁴ However, damage to private property which occurs when a sheriff's officers make a forcible entry in order to execute an arrest warrant is in the nature of a tort, and does not result in a "taking" of private property, as would entitle the owner to just compensation under the eminent domain provision of a state constitution.¹⁵

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Footnotes

- 1 [Knox County v. Harshman](#), 133 U.S. 152, 10 S. Ct. 257, 33 L. Ed. 586 (1890); [Rollins v. Gibson](#), 293 N.C. 73, 235 S.E.2d 159 (1977).
- 2 [Dallas County Constable Precinct No. 5 v. Garden City Boxing Club, Inc.](#), 219 S.W.3d 613 (Tex. App. Dallas 2007).

- 3 Am. Jur. 2d, Abuse of Process §§ 11 to 16.
- 4 Spectrum Mfg. Corp. v. Bank of Lansing, 118 Mich. App. 25, 324 N.W.2d 523 (1982).
- 5 Smith v. Moore, 336 So. 2d 145 (Fla. 1st DCA 1976).
- 6 McKenzie v. Curet, 313 So. 2d 396 (Miss. 1975).
- 7 McKenzie v. Curet, 313 So. 2d 396 (Miss. 1975).
- 8 Chapman for Use of Leavitt v. Smith, 57 U.S. 114, 16 How. 114, 14 L. Ed. 868, 1853 WL 7676 (1853);
Kemp's Wrecker Service v. Grassland Sod Co., Inc., 404 So. 2d 348 (Ala. Civ. App. 1981); Spectrum Mfg.
Corp. v. Bank of Lansing, 118 Mich. App. 25, 324 N.W.2d 523 (1982).
- 9 Bowman v. Waldt, 9 Wash. App. 562, 513 P.2d 559 (Div. 1 1973).
- 10 Williams v. Brooks, 269 Ark. 919, 601 S.W.2d 592 (Ct. App. 1980); Burritt v. Plate, 40 Conn. Supp. 103,
481 A.2d 425 (Super. Ct. 1983).
- 11 Burritt v. Plate, 40 Conn. Supp. 103, 481 A.2d 425 (Super. Ct. 1983).
- 12 Ray v. City Bank & Trust Co. of Natchez, Miss., 358 F. Supp. 630, 36 Ohio Misc. 83, 65 Ohio Op. 2d 112,
13 U.C.C. Rep. Serv. 355 (S.D. Ohio 1973).
- 13 Bowman v. Waldt, 9 Wash. App. 562, 513 P.2d 559 (Div. 1 1973).
- 14 Jeffres v. Countryside Homes of Lincoln, Inc., 214 Neb. 104, 333 N.W.2d 754 (1983).
- 15 Kelley v. Story County Sheriff, 611 N.W.2d 475 (Iowa 2000).

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VII. Civil Liability

A. In General

§ 50. Return or execution of process; levy on property —Omissions and delays; failure to make levy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  106 to 113(4)

Forms

Complaint, petition, or declaration—Against sheriff and county—Failure to serve of sheriff to properly serve summons—Lapse of limitations period, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

Complaint, petition, or declaration—Against sheriff and county—Neglect of deputy in failing to levy execution, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

A statute permitting a plaintiff in an execution to file a motion for damages against the sheriff for the failure to execute is penal in nature and must be strictly construed in favor of the sheriff.¹

Levying officers act at their peril in determining whether property is liable to seizure.² Thus, a sheriff or other officer to whom a valid writ or process is delivered to be levied upon property is liable to the person in whose favor the process or writ runs if the officer fails to make a levy upon property owned by the defendant within the officer's jurisdiction, and, by reason of the officer's failure, the plaintiff is injured.³ Where an order of attachment, the notice of attachment, and the necessary fees were delivered to the defendant sheriff, and, had the notice of attachment been timely filed, the plaintiff judgment creditor would have been able to execute upon the interest of the debtor in the real property at issue, the sheriff was liable to the creditor for failure to file the notice of attachment, which resulted in there never being any levy against the interest of the debtor in the real property.⁴

There may not be liability for failing to execute a levy where the sheriff exercises due diligence or determines that the assets are exempt.⁵ However, a creditor is not precluded from asserting a cause of action for neglect or refusal to execute a writ of execution by the common-law doctrine of judicial immunity where the express language of a statute makes it clear that the legislature intends for the statute to supersede the common law with regard to a sheriff who neglects or refuses to execute a writ.⁶ Once a peace officer learns that a debtor has not filed bankruptcy and that the debtor is hiding and selling assets, the officer has a duty to execute immediately; a deputy who is aware of a debtor's nonexempt assets and is able to seize them but does not, willfully and intentionally, fails to execute.⁷

A plaintiff is not required to attempt to regain an asset lost by a sheriff, nor is the plaintiff under the duty, after a judgment is entered in the underlying action establishing the plaintiff's right to the property, to seek the return of the property.⁸

The fact that the plaintiff probably would not have recovered any proceeds from the sale of attached property if the writ had been carried out will not preclude liability under a statutory amercement proceeding under which the absence of injury is irrelevant to the statutory penalty.⁹

A sheriff's delay may be reasonable where occasioned by the instructions of the creditor.¹⁰

A sheriff has a reasonable time within which to complete the execution of a writ.¹¹ The execution may be completed in multiple steps; thus, a "paper levy" on the property of a judgment debtor, which occurs by placing red tags on the locked doors of the debtors' buildings, vehicles, and other property, can be regarded as merely the commencement of the execution of the writ.¹²

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Footnotes

- 1 [Hickey v. Couchman](#), 797 S.W.2d 103 (Tex. App. Corpus Christi 1990), writ denied, (Feb. 13, 1991) (statute's purpose is to provide creditors with full compensation if sheriff fails to execute).
- 2 [Leroux v. Hudson](#), 109 U.S. 468, 3 S. Ct. 309, 27 L. Ed. 1000 (1883).
Once a judgment creditor has had execution issue, it is not within the discretion of a sheriff to act or not to act or to delay levying upon the judgment debtor's property while awaiting direction from the judgment creditor; although creditors typically provide guidance to a sheriff, the obligation to locate the subject property, to levy upon it appropriately and to conduct a valid sale are the ultimate responsibility of the sheriff alone.
[Nesler v. Hailey](#), 898 S.W.2d 536 (Ky. Ct. App. 1995).
- 3 [Rodgers v. Rodgers](#), 74 Ohio App. 3d 580, 599 N.E.2d 751 (4th Dist. Pike County 1991).
- 4 [Doran v. Sheriff of Orange County](#), 57 A.D.2d 605, 393 N.Y.S.2d 785 (2d Dep't 1977).
- 5 [Takacs v. Baldwin](#), 106 Ohio App. 3d 196, 665 N.E.2d 736 (6th Dist. Huron County 1995) (officer consulted with a prosecuting attorney and acted in the reasonable belief that the property was protected by the automatic stay in place in an individual debtor's individual bankruptcy case); [Kuo Kung Ko v. Pin Ya Chin](#), 934 S.W.2d 839 (Tex. App. Houston 14th Dist. 1996) (debtor's lawyer stated assets were part of probate matter and later filed U.C.C. statement claiming security interest to preclude sale).
A constable is liable to a judgment creditor for failing to levy on a judgment debtor's nonexempt real property, even if the judgment debtor had no nonexempt personal property subject to the execution and the constable was diligent and acted in good faith as to the personal property. [Dallas County Constable Precinct 5 v. KingVision Pay-Per-View, Ltd.](#), 219 S.W.3d 602 (Tex. App. Dallas 2007).
- 6 [Duvall v. Tawney](#), 323 S.W.3d 804 (Mo. Ct. App. E.D. 2010).
- 7 [Hickey v. Couchman](#), 797 S.W.2d 103 (Tex. App. Corpus Christi 1990), writ denied, (Feb. 13, 1991).
- 8 [State ex rel. Mather v. Carnes](#), 551 S.W.2d 272 (Mo. Ct. App. 1977) (overruled on other grounds by, [Hensel v. American Air Network, Inc.](#), 189 S.W.3d 582 (Mo. 2006)).

- 9 Rodgers v. Rodgers, 74 Ohio App. 3d 580, 599 N.E.2d 751 (4th Dist. Pike County 1991).
10 Takacs v. Baldwin, 106 Ohio App. 3d 196, 665 N.E.2d 736 (6th Dist. Huron County 1995); Diversified Ins.
 Management, Inc. v. Phagan, 589 S.W.2d 854 (Tex. Civ. App. Fort Worth 1979).
11 Takacs v. Baldwin, 106 Ohio App. 3d 196, 665 N.E.2d 736 (6th Dist. Huron County 1995).
12 Takacs v. Baldwin, 106 Ohio App. 3d 196, 665 N.E.2d 736 (6th Dist. Huron County 1995).

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VII. Civil Liability

A. In General

§ 51. Return or execution of process; levy on property—Failure to perform civil arrest or enforce restraining order; defective or improper arrest

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  102

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[Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect, 23 A.L.R.5th 834](#)

[Failure to restrain drunk driver as ground of liability of state or local government unit or officer, 48 A.L.R.4th 320](#)

A deputy sheriff does not affirmatively cause a harm, in detaining, but not arresting, an intoxicated driver who subsequently leaves the scene and becomes involved in a fatal accident where the deputy takes precautionary measures by ordering the driver off the road and making arrangements for the driver's return home; rather, the driver sets the act in motion by disobeying the deputy's order.¹ Similarly, a county sheriff and deputies are not liable, based on the deputies' failure to detain an intoxicated driver and prevent the driver from getting into the vehicle, for the death of a motorist and injuries to a passenger sustained in a subsequent collision with the intoxicated driver who was being pursued by the deputies, provided that there was no special relationship between the deputies and the passenger or motorist.²

A statute providing for a cause of action against a sheriff for the failure to obey the command of any process does not make a special duty exception to the public duty doctrine applicable to negligence claims against a sheriff based on the sheriff's failure to execute a warrant for the arrest of an individual, who killed two neighbors after the warrant was issued for a probation violation,

as the neighbor and the neighbor's surviving child are not members of a particular class of individuals referred to in the statutes in that they are not parties to the underlying action for which the warrant was issued.³

A property owner has no due process right to have the police enforce a restraining order or to arrest a neighbor in connection with an ongoing feud, precluding the owner's claims against a sheriff and undersheriff based on their failures to act.⁴

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Footnotes

- 1 [Coty v. Washoe County, 108 Nev. 757, 839 P.2d 97 \(1992\).](#)
- 2 [Cavigliano v. County of Livingston, 254 A.D.2d 817, 678 N.Y.S.2d 186 \(4th Dep't 1998\).](#)
- 3 [Hurd v. Woolfork, 959 S.W.2d 578 \(Tenn. Ct. App. 1997\).](#)
- 4 [Phillips v. Kerns, 483 Fed. Appx. 400 \(10th Cir. 2012\).](#)

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VII. Civil Liability

A. In General

§ 52. Care and custody of seized property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  119 to 124

Forms

Complaint, petition, or declaration—Against sheriff, deputy, and county—Deputy's default in releasing goods from attachment, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

Complaint, petition, or declaration—Against sheriff and surety—Unauthorized delivery of goods to third-party claimant, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

An officer is conferred with judicial immunity when executing writs, subject to liability under statutes for damage to seized property.¹ However, a sheriff or other peace officer, having custody of property pursuant to a levy of attachment or execution, is liable for its loss, damage, or destruction whenever such loss is caused by the failure to exercise proper care and diligence to preserve it.²

An officer levying upon property has a duty to exercise, in its care and preservation, that degree of diligence which an ordinarily prudent person would exercise toward property of a similar nature if vested with complete ownership of it, commonly called "due," "reasonable," or "ordinary" care.³ Thus, while the officer is not responsible as an insurer, or for loss or damage by act of God, the public enemy, or inevitable accident, the officer is responsible for reasonably foreseeable happenings or contingencies that, with the exercise of care commensurate with the danger and having regard for the nature and situation of the property, the officer could have prevented.⁴

The standard of care to be exercised by a sheriff while property is in the sheriff's custody pursuant to attachment is governed by all the surrounding circumstances, such as the nature of the property, its location, and the period of time it is under court process.⁵

The principles rendering officers liable for damage to goods they have seized under a writ of attachment are varied somewhat where officers take tenants' chattels or property in executing writs of restitution. In the absence of an applicable statute or regulation, a sheriff has no duty to safeguard a tenant's possessions after a lawful eviction has occurred even if the sheriff knows the tenant's belongings might be taken if they are left unattended. After the writ has been executed and the landlord has regained possession of the premises, the sheriff's statutory duty has ended, and no liability for subsequent damage to the tenant's property can attach.⁶ However, a city marshal who violated several specific provisions of applicable regulations because, in removing property from the premises of an evicted tenant, he packed a television in a sealed carton, failed to tag it, and failed to note the serial number was held liable for the loss when the evicted tenant could not locate the property upon redeeming it from the city department charged with storing property removed during an eviction.⁷

Officers who misuse property by, for example, carelessly breaking tenants' furniture when putting landlords in possession, notwithstanding acting under writs of possession regular on their face, become trespassers ab initio, and the writ affords no protection.⁸

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Footnotes

- 1 [Abercia v. Kingvision Pay-Per-View, Ltd., 217 S.W.3d 688 \(Tex. App. El Paso 2007\).](#)
- 2 [State ex rel. and to Use of Williams v. Feld Chevrolet, Inc., 403 S.W.2d 672 \(Mo. Ct. App. 1966\) \(constable\); Jeffres v. Countryside Homes of Lincoln, Inc., 214 Neb. 104, 333 N.W.2d 754 \(1983\) \(sheriff\).](#)
- 3 [Garren v. Butigan, 96 Idaho 906, 539 P.2d 259 \(1975\).](#)
- 4 [Ritter v. Castellini, 173 N.J. Super. 509, 414 A.2d 614 \(Law Div. 1980\).](#)
- 5 [Ray v. City Bank & Trust Co. of Natchez, Miss., 358 F. Supp. 630, 36 Ohio Misc. 83, 65 Ohio Op. 2d 112, 13 U.C.C. Rep. Serv. 355 \(S.D. Ohio 1973\).](#)
- 6 [Christensen v. Hoover, 643 P.2d 525 \(Colo. 1982\).](#)
- 7 [Marcado v. Weinheim, 108 Misc. 2d 81, 436 N.Y.S.2d 973 \(N.Y. City Civ. Ct. 1981\).](#)
- 8 [Jeffres v. Countryside Homes of Lincoln, Inc., 214 Neb. 104, 333 N.W.2d 754 \(1983\).](#)

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VII. Civil Liability

A. In General

§ 53. Care and custody of seized property—Liability for money collected

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  119 to 124

Forms

Forms related to the failure to pay money collected from an execution sale, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

All the remedies against a marshal necessary to compel payment over of money made on an execution survive the marshal's term of office and remain in full force until the execution is completed.¹

A sheriff's liability may be based on the theory that when a sheriff receives money in executing a judgment, the sheriff becomes a trustee of that money, and the judgment creditor is the beneficiary of that trust.² Although the money received in executing a judgment may have commingled with other moneys as to which the sheriff was also a trustee, it remains identifiable as a specific fund held to a specific purpose.³

Some statutes require that a sheriff deposit funds collected for the state or a local governmental subdivision in certain banks designated as fiscal agent banks.⁴

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Footnotes

- 1 [McFarland v. Gwin](#), 44 U.S. 717, 3 How. 717, 11 L. Ed. 799, 1845 WL 6021 (1845).
- 2 [National Automobile & Cas. Ins. Co. v. Pitchess](#), 35 Cal. App. 3d 62, 110 Cal. Rptr. 649 (2d Dist. 1973) (abrogated on other grounds by, [City of Stockton v. Superior Court](#), 42 Cal. 4th 730, 68 Cal. Rptr. 3d 295, 171 P.3d 20 (2007)).
- 3 [National Automobile & Cas. Ins. Co. v. Pitchess](#), 35 Cal. App. 3d 62, 110 Cal. Rptr. 649 (2d Dist. 1973) (abrogated on other grounds by, [City of Stockton v. Superior Court](#), 42 Cal. 4th 730, 68 Cal. Rptr. 3d 295, 171 P.3d 20 (2007)).
- 4 [Parish Nat. Bank v. Blair](#), 351 So. 2d 1242 (La. Ct. App. 1st Cir. 1977), writ denied, 353 So. 2d 1336 (La. 1978) and writ denied, 353 So. 2d 1341 (La. 1978) (construing the statute as not requiring that the sheriff deposit funds held by sheriff for sheriff's own account in such banks).

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VII. Civil Liability

A. In General

§ 54. Return of process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  123 to 151

The failure of the sheriff, constable, or other officer to make a return, within the time fixed by law, of a writ or process placed in the officer's hands for execution,¹ is a breach of duty which ordinarily renders the officer civilly liable to the creditor.² A sheriff satisfies the statutory obligation to effect a prompt return of execution, as long as the sheriff behaves in a timely fashion in filing a written return advising of the progress of the levy, provided that the statute does not require the sheriff to complete the execution sale in order to effect a return of execution.³

The officer's failure to make a return within the statutory time generally renders the officer a trespasser ab initio to the owner of the property, and liable in conversion to the owners for the value of the property at the time of the seizure.⁴

A sheriff is not liable for failure to make due return of an execution issued on a void judgment.⁵

A party allegedly served with process by a sheriff may, in the event the sheriff has not acted with propriety, bring an action against the sheriff for a false return.⁶ A sheriff is liable to the person served for negligently making out a false return of service.⁷ A sheriff can be held liable for false return of criminal process which states only that a defendant "after due and diligent search is not to be found."⁸ A person who claims that a sheriff made a false return of a summons, and that a default judgment was entered as a result, is not required to have the default judgment in the underlying action vacated before bringing an action against the sheriff.⁹

A sheriff may move to amend a return of process so as to make it true even after suit has been brought for the penalty imposed for a false return and even though the amendment defeats the plaintiff's right to recover such a penalty. However, such an amendment is within the discretion of the presiding judge.¹⁰

The failure to comply with a statutory obligation to effect a prompt return of execution may result in the imposition of a statutory penalty.¹¹

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Footnotes

- 1 As to return of process generally, see Am. Jur. 2d, Process[[Westlaw®\(r\) Search Query](#)].
- 2 *Com. v. McCoy*, 8 Watts 153, 1939 WL 1620 (Pa. 1939).
- 3 *Nesler v. Hailey*, 898 S.W.2d 536 (Ky. Ct. App. 1995).
- 4 *Shaffner v. Price*, 63 S.D. 456, 260 N.W. 703, 98 A.L.R. 689 (1935).
- 5 *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801 (1923).
- 6 *Miller v. Carr*, 221 Pa. Super. 306, 292 A.2d 423 (1972).
- 7 *Heredia v. Contino*, 79 Misc. 2d 222, 360 N.Y.S.2d 144 (App. Term 1973).
- 8 *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).
- 9 *Jackson v. Missouri Rating & Collection Co.*, 537 S.W.2d 442 (Mo. Ct. App. 1976).
- 10 *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).
- 11 *Nesler v. Hailey*, 898 S.W.2d 536 (Ky. Ct. App. 1995) (30% penalty).

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VII. Civil Liability

A. In General

§ 55. Sale under process

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[Propriety of accepting check or promissory note in satisfaction of bid at execution or judicial sale had for cash, 86 A.L.R.2d 292](#)

Trial Strategy

Execution against property. [Collection Practice, 12 Am. Jur. Trials 193](#) § 41

Forms

Complaint, petition, or declaration—Against sheriff and county—Exempt property seized on execution—Alternative claims for recovery of possession or for compensatory and punitive damages, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables[[Westlaw®\(r\) Search Query](#)]

A peace officer is authorized, by a valid writ of execution directed to the officer, to sell property that has been levied upon.¹

A statute setting forth the requirements for a proper execution sale may have the ultimate effect of protecting the sheriff or other peace officers against subsequent claims by the judgment creditors.²

Sheriffs cannot be purchasers, jointly or otherwise, either for themselves or for others, at sheriffs' own execution sales; such purchases are void.³

In accordance with the general rule that requires an execution officer to accept nothing except money in payment, a sheriff or constable who, at an execution or judicial sale had for cash, accepts a check in lieu of cash, is rendered liable for the money to the party or parties entitled to it⁴ unless the judgment creditor consents to the sheriff's accepting payment in a form other than cash.⁵

If the officer has notice that the true owner of the property sold at execution sale is someone other than the judgment debtor, the officer may be liable in conversion to the true owner.⁶

Having levied upon a judgment debtor's property pursuant to a writ of execution, the sheriff is bound to offer the property for sale in a timely manner, and cannot delay a sale until the judgment creditor has first obtained a writ of venditioni exponas or otherwise directed the sheriff in statutory duties.⁷

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Footnotes

- 1 For execution of writ to sell levied property, see Am. Jur. 2d, Executions and Enforcement of Judgments[[Westlaw®\(r\) Search Query](#)].
- 2 [Preston Farms, Inc. v. Nacri](#), 42 A.D.2d 668, 345 N.Y.S.2d 696 (3d Dep't 1973).
- 3 [Associates Financial Services Co., Inc. v. Johnson](#), 128 Ga. App. 712, 197 S.E.2d 764 (1973); [Watkins v. Floyd](#), 492 S.W.2d 865 (Mo. Ct. App. 1973).
- 4 [Buckeye Development Corp. v. Brown & Shilling, Inc.](#), 243 Md. 224, 220 A.2d 922 (1966).
- 5 [Larned Production Credit Ass'n v. E & E Feeding](#), 8 Kan. App. 2d 263, 655 P.2d 138 (1982).
- 6 [Teddy's Drive In, Inc. v. Cohen](#), 47 N.Y.2d 79, 416 N.Y.S.2d 782, 390 N.E.2d 290 (1979).
- 7 [Nesler v. Hailey](#), 898 S.W.2d 536 (Ky. Ct. App. 1995).

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

[Topic Summary](#) | [Correlation Table](#)

Research References

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A.L.R. Index, Marshals
A.L.R. Index, Police and Law Enforcement Officers
A.L.R. Index, Process and Service of Process and Papers
A.L.R. Index, Sheriffs
A.L.R. Index, Vicarious Liability
West's A.L.R. Digest, [Sheriffs and Constables](#) 🔑 100, 106 to 120

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 56. Liability for acts of deputy, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#) 🔑100

The decisions are not in harmony as to the exact scope of the liability of a sheriff, constable, marshal, or other peace officer for acts of a deputy.¹ To some extent, the problem is clouded by distinctions between acts done by virtue of office and those done under color of office.² Some of the authorities declare that a sheriff is liable for all official neglect or misconduct of a deputy, and also for the deputy's acts not required by law, where the deputy assumes to act under color of that office.³ Other statements of the rule are to the effect that, when a deputy is acting in an official capacity, then the sheriff is liable for the injury negligently caused by the deputy.⁴ Another statement of the rule contends that a sheriff or constable is not liable for the unauthorized acts of deputies where the liability arises in tort unless the sheriff or constable authorizes, participates in, or ratifies the individual tortious acts of the deputies.⁵

As a general rule, sheriffs are liable civilly but not criminally for the acts and omissions of their deputies appointed or selected by them when the deputies are acting officially or under color of the office.⁶

The general rule of liability of a sheriff for the actions of deputies performed in the course and scope of their official duties may be abolished by case law.⁷ Other jurisdictions create an exception to the sheriff's personal liability for acts and omissions performed while the deputies are performing criminal justice functions.⁸ It has been held that a deputy chooses to be exposed to certain risks, and thus, the sheriff is not liable for injuries to the sheriff caused by such exposure.⁹

The responsibility of a sheriff, or other officer performing similar duties, for a deputy's acts does not extend to acts performed by the deputy before the sheriff took office.¹⁰

Liability is frequently based on the ground that the sheriff and the deputy are one officer and that the acts of the deputy are the acts of the officer.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Detainee who was assaulted by jailer failed to allege facts showing that jailer was acting within scope of his employment, as required to state claim under state Municipal Tort Claims Act (MTCA) that county and sheriff were vicariously liable for detainee's injuries; detainee alleged that jailer used excessive force to harm unarmed detainee, in violation of official county policy, for purposes unrelated to any official function of jailer's job, detainee failed to allege with particularity any custom or practice by county or sheriff condoning use of such force that jailer's conduct was intended to serve, and detainee failed to allege to suggest that county or sheriff knew about any violent or indecent tendencies that would make jailer's actions foreseeable. [Iowa Code Ann. § 670.2\(1\)](#); [Fed. R. Civ. P. 8\(a\)\(2\)](#). [Meyer v. Herndon](#), 419 F. Supp. 3d 1109 (S.D. Iowa 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Jordan v. Kelly](#), 223 F. Supp. 731 (W.D. Mo. 1963).
- 2 As to effect of the distinction on liability of the officer's official sureties, see § 71.
- 3 [Williams v. U.S.](#), 353 F. Supp. 1226 (E.D. La. 1973); [Karr v. Dow](#), 84 N.M. 708, 1973-NMCA-016, 507 P.2d 455 (Ct. App. 1973).

A sheriff, as an official of a political subdivision, is liable under Florida law for a wrongful act or omission of any employee of the agency while acting within the scope of office or employment under circumstances in which the state or agency, if a private person, would be liable to the claimant in accordance with the general laws of the state. A vicarious liability claim against a sheriff challenging the manner in which a detention center's procedures are implemented through individual corrections officers, and not the procedures themselves, is not barred by sovereign immunity. [Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.](#), 402 F.3d 1092, 66 Fed. R. Evid. Serv. 892 (11th Cir. 2005) (applying Florida law).
- 4 [Mozingo v. Barnhart](#), 169 W. Va. 31, 285 S.E.2d 497 (1981).
- 5 [Wallace v. City of Columbus](#), 2002 WL 31844688 (S.D. Ohio 2002) (officer's use of mace must be proven city policy); [Williams v. Thomas](#), 511 F. Supp. 535 (N.D. Tex. 1981).
- 6 [Rogers v. The Marshal](#), 68 U.S. 644, 17 L. Ed. 714, 1863 WL 6648 (1863); [Dogarin v. Connor](#), 6 Ariz. App. 473, 433 P.2d 653 (1967).

As to criminal responsibility of sheriff for the acts of deputies generally, see § 156.
- 7 [Slack v. Bishop](#), 444 F. Supp. 1161 (W.D. La. 1978).
- 8 [Berliner v. Thompson](#), 174 A.D.2d 220, 578 N.Y.S.2d 687 (3d Dep't 1992).
- 9 [Witkowski v. Milwaukee County](#), 480 F.3d 511 (7th Cir. 2007) (applying Wisconsin law).
- 10 [Parker v. Robertson](#), 360 So. 2d 785 (Fla. 2d DCA 1978); [Karr v. Dow](#), 84 N.M. 708, 1973-NMCA-016, 507 P.2d 455 (Ct. App. 1973).
- 11 [Scott v. Vandiver](#), 476 F.2d 238 (4th Cir. 1973) (applying South Carolina law); [Tanner v. McCall](#), 625 F.2d 1183 (5th Cir. 1980).

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 57. Statutory provisions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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In some states, the liability of a sheriff or constable for acts of deputies is imposed by statute. Under such a statute, liability is imposed on a sheriff in an official capacity as the employer of a deputy (but not in a personal capacity) for the deputy's torts in the course and scope of the deputy's employment.¹ However, these statutes are merely declaratory of the common law.²

Under a statute construed as indicating that a county commission has the discretion to supervise the conduct of a county constable, but not the deputy counsel, the person solely responsible for the supervision of a deputy constable is the constable; hence, a constable is liable for all the official acts of a deputy.³ Similarly, a statute providing that the sheriff is responsible for the default or misconduct of an undersheriff or deputies does not impose liability on a sheriff for every act of misconduct by a deputy; liability attaches only where the misconduct occurs in the deputy's performance of an official act, which is an act that the law requires the deputy officially to perform and includes any act done by an officer in an official capacity under color of office.⁴

Even though a statute makes a sheriff responsible for the neglect of duty or misconduct in office of deputies, deputy sheriffs are not necessarily in fiduciary relationships with their sheriffs by virtue of such a statute; rather, the issue is one of fact, to be determined by the jury.⁵

On the other hand, there are also statutes providing that a sheriff is not responsible for acts of a deputy sheriff.⁶ Alternately, statute may limit liability, providing that, even though the sheriff is vicariously liable for the wrongful acts of a deputy, the sheriff's exposure may be restricted by statute to the amount of the deputy's bond.⁷

Civil service rules may affect the liability of a chief of police for the acts of a deputy or subordinate officer.⁸

CUMULATIVE SUPPLEMENT

Cases:

Allegations by employee of sheriff's office that sheriff ratified conduct of his officers in searching employee's old cell phone without a warrant by placing employee on leave and terminating employee were insufficient to plead sheriff was involved in, had knowledge of, or recklessly disregarded officers' alleged misconduct, as required for Ohio statutory immunity to not apply to sheriff in employee's action alleging various tort claims, including invasion of privacy. [Ohio Rev. Code Ann. § 311.05](#). [Sollenberger v. Sollenberger](#), 173 F. Supp. 3d 608 (S.D. Ohio 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Jenkins v. Jefferson Parish Sheriff's Office](#), 402 So. 2d 669 (La. 1981).
- 2 [Evans v. Hardcastle](#), 339 So. 2d 1150 (Fla. 2d DCA 1976); [Magenheimer v. State ex rel. Dalton](#), 120 Ind. App. 128, 90 N.E.2d 813 (1950).
- 3 [Smith v. Hill](#), 510 F. Supp. 767 (D. Utah 1981).
- 4 [Monroe v. Darr](#), 214 Kan. 426, 520 P.2d 1197 (1974).
- 5 [Yarosh v. Becane](#), 63 Ohio St. 2d 5, 17 Ohio Op. 3d 3, 406 N.E.2d 1355 (1980) (this finding was relevant to a determination whether deputies were employees in unclassified service, who lacked the procedural and substantive statutory safeguards available to employees in classified service).
- 6 [O'Neal v. DeKalb County](#), 531 S.W.2d 296 (Tenn. 1975).
- 7 [Sciortino v. Alfano](#), 435 So. 2d 1010 (La. Ct. App. 5th Cir. 1983), writ denied, 437 So. 2d 1149 (La. 1983).
- 8 [Am. Jur. 2d, Civil Service §§ 63 to 72](#).

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 58. Failure to supervise, train, or discipline deputy

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[Liability of supervisory officials and governmental entities for having failed to adequately train, supervise, or control individual peace officers who violate plaintiff's civil rights under 42 U.S.C.A. sec. 1983, 70 A.L.R. Fed. 17](#)

Supervisory liability imposed on a sheriff requires proof of the underlying liability of a deputy.¹

In addition to hiring deputies, the sheriff is also responsible for their supervision;² thus, the sheriff's liability for the acts of deputies may be based upon a failure to adequately train and supervise them.³ Thus, for example, the warden of a county's detention facility and county sheriff were held responsible for policies or customs that operated and were enforced by their subordinates and for any failure to adequately train their subordinates; state statutes charged both the warden and the sheriff with responsibility to supervise the subordinates in diligently filing a criminal complaint or information and ensuring that arrestees received a prompt probable cause hearing.⁴ Claims by a mother and daughter for negligent training and supervision and negligent infliction of emotional distress against a sheriff and deputies, based on the deputies entering their home and arresting the residents while looking for the father, were not precluded by sovereign immunity.⁵

However, no tort litigation could be maintained where there was no evidence that a county sheriff failed to properly train and supervise deputies or that the sheriff acted in bad faith, and thus, the sheriff was entitled to qualified immunity from an arrestee's

assault, battery, and negligence claims arising from an arrest.⁶ And the risk that a county detention officer would commit sexual assault on a female inmate was not reasonably foreseeable, and thus, the county sheriff acted reasonably in placing the officer on probation rather than terminating the officer, thus, the sheriff was entitled to qualified immunity from liability in an action premised on negligent training and supervision.⁷

A claim of supervisory liability based on negligent hiring requires a court to determine whether the injured party can demonstrate that the sheriff's decision to hire the deputy, with knowledge of the deputy's background, reflects a conscious disregard for a high risk that the deputy would use excessive force in violation of the injured party's federally protected rights.⁸

Allegations that a supervisory law enforcement officer not only had knowledge of and acquiesced in alleged constitutional violations by subordinates, but personally participated in such conduct, sufficiently sets out the essential elements for supervisory liability in a lawsuit under [42 U.S.C.A. § 1983](#) alleging a violation of substantive due process rights.⁹

CUMULATIVE SUPPLEMENT

Cases:

City resident failed to plausibly allege that police chief had requisite notice that police officer would assault and rape resident when officer was sent to investigate resident's claim that her child had been harassed at school, and thus resident failed to state [§ 1983](#) claim for supervisory liability against police chief based on deliberate indifference; officer had several disciplinary violations prior to alleged assault and rape, including for failure to maintain firearm license, but violations did not indicate that officer had propensity for violence or any other sufficiently related conduct. [42 U.S.C.A. § 1983. Saldivar v. Racine, 818 F.3d 14 \(1st Cir. 2016\).](#)

Allegations by minor suspect that police lieutenant ordered subordinate officer to use stun gun against suspect to stop suspect from fleeing, that officer then used stun gun against suspect, that suspect was unarmed, not a threat to third parties, and not suspected of a crime, and that suspect was injured as a result stated plausible [§ 1983](#) supervisor liability claim against lieutenant, based on officer's use of excessive force, but not for bystander liability, in light of additional allegations that lieutenant also ordered subordinate officer to shut off the stun gun after suspect was on the ground and lieutenant noticed that suspect was shaking. [U.S. Const. Amend. 4; 42 U.S.C.A. § 1983. Pena v. City of Rio Grande City, 879 F.3d 613 \(5th Cir. 2018\).](#)

City police chief could not be held liable under [§ 1983](#) for failing to supervise and train officers involved in fatal shooting, absent evidence of chief's personal involvement in the incident. [42 U.S.C.A. § 1983. Kaur v. City of Lodi, 263 F. Supp. 3d 947 \(E.D. Cal. 2017\).](#)

There was no evidence that former colonel with state police, who resigned before incident in which passenger in vehicle was arrested at DUI checkpoint maintained by state police and borough police departments, was deliberately indifferent to passenger's rights, as would subject colonel to liability under [§ 1983](#), based on failure to train or supervise theory, for law enforcement officers' alleged unlawful arrest of passenger and alleged use of excessive force when they deployed stun gun multiple times to subdue him. [U.S. Const. Amend. 4; 42 U.S.C.A. § 1983. Ward v. Noonan, 147 F. Supp. 3d 262 \(M.D. Pa. 2015\).](#)

Plaintiff failed to state claim against former constable for failure to train, under theory of supervisory liability under [§ 1983](#), based on deputy constable's sexual assault of plaintiff after pulling her over, where plaintiff failed to allege how training was defective, that constable had any knowledge of pattern of violations necessary to demonstrate deliberate indifference, or that constable had knowledge that deputy constable needed different or better training. [42 U.S.C.A. § 1983. Doe on behalf of M.F. v. Harris County Precinct Six Constable Sylvia Trevino, 452 F. Supp. 3d 548 \(S.D. Tex. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [Harrell v. Purcell](#), 236 F. Supp. 2d 526 (M.D. N.C. 2002).
- 2 [Mozingo v. Barnhart](#), 169 W. Va. 31, 285 S.E.2d 497 (1981).
- 3 [Gonzalez-Mercado v. Municipality of Guaynabo](#), 206 F. Supp. 2d 257 (D.P.R. 2002); [Mozingo v. Barnhart](#), 169 W. Va. 31, 285 S.E.2d 497 (1981) (deputies were not given any instruction as to where or how their pistols were to be used, but were only advised to be careful with their weapons).
- 4 [Wilson v. Montano](#), 715 F.3d 847 (10th Cir. 2013) (applying New Mexico law).
- 5 [Vasconez v. Hansell](#), 871 F. Supp. 2d 1339 (M.D. Fla. 2012) (applying Florida law).
- 6 [Nichols v. Bourbon County Sheriff's Dept.](#), 26 F. Supp. 3d 634, 311 Ed. Law Rep. 829 (E.D. Ky. 2014) (applying Kentucky law). A sheriff's department was not liable for failure to train its officers on the proper use of stun guns in deliberate indifference to the rights of suspects to be free from the use of excessive force, where the officer's repeated use of the stun gun in an attempt to subdue a suspect who was out of control, actively and forcibly resisting arrest, and refusing to be handcuffed did not violate a clearly established right. [Hagans v. Franklin County Sheriff's Office](#), 695 F.3d 505 (6th Cir. 2012).
- 7 [Uinta County v. Pennington](#), 2012 WY 129, 286 P.3d 138 (Wyo. 2012).
- 8 [Morris v. Crawford County](#), 299 F.3d 919 (8th Cir. 2002).
- 9 [Sanders v. Board of County Com'rs of County of Jefferson, Colorado](#), 192 F. Supp. 2d 1094 (D. Colo. 2001).

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 59. Defective levy, execution, sale, or return

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Where a deputy sheriff makes a levy upon property not authorized by the writ of execution, the sheriff is responsible with the deputy for damages.¹

Under a statute providing that no sheriff is liable for damages caused by the sheriff's deputies whether based upon their acts or failures to act, a sheriff could not be held liable for a deputy's failure to make return of an execution within the time required by statute.²

Plaintiffs alleging that a deputy sheriff made a false return of service have the burden of establishing that service of civil process was within the deputy's authority.³

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Footnotes

- ¹ [Monroe v. Darr](#), 221 Kan. 281, 559 P.2d 322 (1977).
- ² [Rogers v. Anderson](#), 580 S.W.2d 782 (Tenn. 1979).
- ³ [Karr v. Dow](#), 84 N.M. 708, 1973-NMCA-016, 507 P.2d 455 (Ct. App. 1973).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 60

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 60. Acts in connection with arrest or imprisonment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  100

Trial Strategy

[Police Misconduct Litigation—Plaintiff's Remedies](#), 15 Am. Jur. Trials 555

Forms

Complaint, petition, or declaration—Against constable and surety—False arrest and imprisonment, battery, and malicious prosecution, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

A sheriff may be liable for the wrongful acts of a deputy in making an arrest, including alleged violations of the suspect's civil rights,¹ using excessive force to capture persons committing a crime,² and escaping prisoners³ where such acts are done by virtue of an office as a deputy and within the scope of authority.⁴

A deputy sheriff who acted reasonably in fatally wounding a suspect is not liable for use of excessive force or for wrongful death.⁵

If superior officers order that an arrest be made, their actions may be so intertwined with that of the officer making the arrest that the liability of all must be considered together.⁶

CUMULATIVE SUPPLEMENT

Cases:

An officer can be liable for using excessive force against a suspect who no longer posed a threat. [U.S. Const. Amend. 4. Hooks v. Atoki](#), 983 F.3d 1193 (10th Cir. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 61.
- 2 [Morris v. Crawford County](#), 299 F.3d 919 (8th Cir. 2002); [Michel v. Hometown Super Markets, Inc.](#), 352 So. 2d 357 (La. Ct. App. 4th Cir. 1977).
- 3 [Andry v. Parish of Orleans](#), 309 So. 2d 814 (La. Ct. App. 4th Cir. 1975).
- 4 As to false imprisonment, see Am. Jur. 2d, False Imprisonment[[Westlaw®\(r\) Search Query](#)].
- 5 [Figg v. Schroeder](#), 312 F.3d 625, 54 Fed. R. Serv. 3d 799 (4th Cir. 2002) (applying Virginia law).
- 6 [Nesmith v. Alford](#), 318 F.2d 110 (5th Cir. 1963).

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 61. Deprivation of civil rights

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The federal courts generally reject the concept of imposing vicarious liability upon a public officer, such as a sheriff or police commissioner, for a deputy's civil rights violations¹ under the applicable federal statute.²

Observation:

In the context of district attorneys' offices, and arguably applicable to sheriffs' offices, the Supreme Court has held that a district attorney is entitled to rely on prosecutors' professional training and ethical obligations, so as not to be deliberately indifferent, for the purpose of a civil rights lawsuit, to the need for training of those in the office, unless there is specific reason, such as a pattern of violations, to believe that the prosecutors' training is insufficient to prevent future constitutional violations in the usual and recurring situations with which prosecutors must deal.³

Exceptions to the general rule rejecting vicarious liability for civil rights violations have been recognized where the sheriff participated directly in, was present at, or otherwise authorized the actions of a deputy;⁴ absent such involvement, however, the sheriff escapes liability.⁵

In a § 1983 action, a county or sheriff in its official capacity cannot be held liable for constitutional violations when there was no underlying constitutional violation by any of its officers.⁶

Where state law imposes liability without personal fault on the particular superior for the wrong of a subordinate in the scope of employment, state law may require that a sheriff be found liable for the civil rights violations committed by a deputy.⁷ Other courts have specifically stated that liability, cognizable under § 1983, of a superior for civil rights violations by subordinates cannot be imposed by reference to state laws imposing vicarious liability on such superiors for subordinates' wrongs.⁸

CUMULATIVE SUPPLEMENT

Cases:

There was no evidence that police officer, who allegedly was only in room where sexual assault suspect was being interrogated by a deputy for about five minutes before interrogation ended, violated any law by failing to give sexual assault suspect the *Miranda* advisal, thus precluding suspect's § 1983 *Miranda* violation claim against officer, where there was no evidence that officer was aware if in fact suspect had been advised of his *Miranda* rights, nor were there indicia that suspect had been placed into custody when he was allegedly voluntarily writing a statement giving his confession, as would have necessitated the *Miranda* warning. 42 U.S.C.A. § 1983. *Tekoh v. County of Los Angeles*, 270 F. Supp. 3d 1163 (C.D. Cal. 2017).

Arrestee's allegations were insufficient to impose § 1983 or New Jersey Civil Rights Act (NJCR) supervisory liability on city's police chief, in his official capacity, for arresting officer's actions in making arrest for possession of false identification without probable cause and depriving arrestee of his liberty and property in violation of the Fourth and Fourteenth Amendments; complaint did not set forth sufficient facts to establish that chief established or maintained a policy, practice, or custom that directly caused any alleged constitutional harm to arrestee, there were no allegations that chief was in any way involved in arrest and detention, let alone that he participated in any alleged violations of arrestee's rights or directed others to violate those rights, and there were no well-pled allegations that chief had knowledge of and acquiesced in any alleged unlawful conduct on part of arresting officer. U.S. Const. Amends. 4, 14; 42 U.S.C.A. § 1983; N.J. Stat. Ann. § 10:6-1 et seq. *Janowski v. City of North Wildwood*, 259 F. Supp. 3d 113 (D.N.J. 2017).

County sheriff's deputy was personally involved in alleged violation of arrestees' Fourth Amendment rights to be free from warrantless entry into their home to sufficient degree required for liability under § 1983; although deputy never entered arrestees' home, deputy's actions precluded finding that consent to warrantless entry was voluntary, since he deceived arrestees by stating that he was sending deputies to check well-being of arrestees' grandchild and verify contents of custody order and telling arrestee that, if order stated that arrestees were allowed to pick up child for visitation with his father, everything would be fine, but instead told deputies to arrest and transport arrestees to county line. U.S. Const. Amend. 4. *Albea v. Bunn*, 281 F. Supp. 3d 670 (W.D. Tenn. 2017).

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Footnotes

- 1 *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973); *Painter v. Baltimore County, Md.*, 535 F. Supp. 321 (D. Md. 1982); *Delaney v. Dias*, 415 F. Supp. 1351 (D. Mass. 1976); *Kroes v. Smith*, 540 F. Supp. 1295 (E.D. Mich. 1982); *Dunkin v. Lamb*, 500 F. Supp. 184 (D. Nev. 1980); *Manfredonia v. Barry*, 401 F. Supp. 762 (E.D. N.Y. 1975); *Schweiker v. Gordon*, 442 F. Supp. 1134 (E.D. Pa. 1977).
- 2 42 U.S.C.A. § 1983.

3 [Connick v. Thompson](#), 563 U.S. 51, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011).

4 [Campbell v. Buckles](#), 448 F. Supp. 288 (E.D. Tenn. 1976).

5 [Harris v. Pirch](#), 677 F.2d 681 (8th Cir. 1982); [Hopper v. Hayes](#), 573 F. Supp. 1368 (D. Idaho 1983).

There was no evidence of a direct causal link between sheriff's failure to act on alleged complaints of a police detention officer's anger problems and the alleged use of excessive force by the off-duty officer when he fatally shot a passenger in a vehicle as required for sheriff to be liable under § 1983 in an official capacity for failure to supervise the officer. [Rossiter v. Robinson](#), 716 F. Supp. 2d 1018 (D. Colo. 2010).

To hold a SWAT team supervisor liable under § 1983 for alleged unconstitutional acts of subordinates, a plaintiff must demonstrate an affirmative link through facts showing that the supervisor actively participated or acquiesced in the constitutional violation, and this requirement is met where the supervisor personally participates in the violation, exercises control or direction over the offending officers, or fails to adequately supervise those for whom the supervisor is responsible. [Santistevan v. City of Colorado Springs](#), 983 F. Supp. 2d 1295 (D. Colo. 2013).

6 [Palmer v. Board of Com'rs for Payne County Oklahoma](#), 765 F. Supp. 2d 1289 (W.D. Okla. 2011), *aff'd*, 441 Fed. Appx. 582 (10th Cir. 2011).

7 [Knipp v. Weikle](#), 405 F. Supp. 782 (N.D. Ohio 1975); [Brunson v. Hyatt](#), 409 F. Supp. 35 (D.S.C. 1976); [Whited v. Fields](#), 581 F. Supp. 1444 (W.D. Va. 1984).

8 [Marks v. Lyon County Bd. of County Com'rs](#), 590 F. Supp. 1129 (D. Kan. 1984).

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VII. Civil Liability

B. Liability of Officer for Acts of Deputy

§ 62. Operation of motor vehicle

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#) 🔑 100

Trial Strategy

[Negligent Vehicular Police Chase, 41 Am. Jur. Proof of Facts 2d 79](#)

The liability of a sheriff or other peace officer for damages resulting to a third person from the operation of a motor vehicle by a deputy or other subordinate of the peace officer depends heavily upon the circumstances presented. A cause of action is stated against a sheriff and deputy by one injured in a collision with a car driven by a deputy sheriff responding to an emergency situation without audible or visible emergency devices.¹

Conversely, liability will not attach where there is no evidence that a deputy sheriff's decision to pursue a vehicle, or that the manner in which the pursuit occurred, evinced a reckless disregard for the safety of others.²

If a deputy sheriff was on personal business when colliding a motor vehicle with that of the plaintiff, the deputy would be individually liable; but if on official business for the sheriff, then the sheriff also would be liable for the deputy's negligence.³ And, under a statute providing that all sheriffs are liable for the acts of their deputies, when a deputy sheriff negligently uses an automobile furnished for official use and used by virtue of or under color of office, or in an official position as deputy sheriff, then the sheriff is liable to the person injured as a proximate result.⁴

A deputy sheriff does not owe a duty of care to protect an active lawbreaker in a motor vehicle pursuit from harm by not pursuing or attempting to stop the lawbreaker, and thus, neither the deputy nor the deputy's employer are liable to the lawbreaker for an accident that occurs when the lawbreaker loses control of the vehicle due to the deputy's continued pursuit of the lawbreaker even where the pursuit is in alleged violation of the sheriff's internal procedures.⁵

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Footnotes

- 1 [Cornwall v. Larsen, 571 P.2d 925 \(Utah 1977\).](#)
- 2 [McCullen v. County of Rensselaer, 210 A.D.2d 779, 620 N.Y.S.2d 527 \(3d Dep't 1994\)](#) (deputy's speed was reasonable, length of pursuit was short, and reasons for pursuit—including speeding and reckless driving — were valid).
- 3 [Barr v. Davis, 369 So. 2d 513 \(Miss. 1979\).](#)
- 4 [Poole v. Brunt, 338 So. 2d 991 \(Miss. 1976\).](#)
- 5 [Bryant v. Beary, 766 So. 2d 1157 \(Fla. 5th DCA 2000\)](#) (deputy did not create zone of risk to lawbreaker by pursuing him for his violation of law, nor did he cause lawbreaker any harm, as lawbreaker had absolute duty to stop when directed to do so by deputy, and any injuries incurred by lawbreaker because he failed to do so were caused solely by himself).

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VII. Civil Liability

C. Defenses

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Research References

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A.L.R. Index, Marshals

A.L.R. Index, Police and Law Enforcement Officers

A.L.R. Index, Process and Service of Process and Papers

A.L.R. Index, Public Officers and Employees

A.L.R. Index, Sheriffs

West's A.L.R. Digest, [Sheriffs and Constables](#)  98(1) to 98(5)

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VII. Civil Liability

C. Defenses

§ 63. Sheriff's defenses, generally

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West's Key Number Digest

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After a plaintiff in an execution sets forth a prima facie case for failure to execute,¹ the sheriff may disprove any element, including the debtor's ownership of assets; at that point, the burden shifts to the sheriff to plead and prove one of the defenses or mitigation.²

Lack of injury to a claimant is not a sufficient defense to a statutory amercement action arising out of a sheriff's alleged failure to execute a writ.³ That the plaintiff was not injured may be established by a showing that the debtor is insolvent and no amount of diligence by the sheriff could have recovered any sum, that the debtor's assets are exempt, or by proof of the intervention of a bankruptcy court.⁴ If any defense applies to a sheriff's failure to execute, the sheriff may show mitigation of damages; mitigation of damages is established by proof that the market value of the debtor's nonexempt property is less than the amount of the underlying judgment held by the plaintiff in execution.⁵

While not a defense to liability, a peace officer such as a sheriff may seek to invoke statutory indemnification provisions against liability.⁶

Public officers are generally held not liable for payments out of public funds in reliance upon an unconstitutional statute.⁷

Good faith in the performance of an officer's duties is not a defense to an action under a statute which imposes sanction or liability on the basis of willful or fraudulent actions or on neglect of official duty.⁸

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Footnotes

- 1 §§ 49, 50.
- 2 [Kuo Kung Ko v. Pin Ya Chin](#), 934 S.W.2d 839 (Tex. App. Houston 14th Dist. 1996).
- 3 [Rodgers v. Rodgers](#), 74 Ohio App. 3d 580, 599 N.E.2d 751 (4th Dist. Pike County 1991); [Hickey v. Couchman](#), 797 S.W.2d 103 (Tex. App. Corpus Christi 1990), writ denied, (Feb. 13, 1991).
- 4 [Hickey v. Couchman](#), 797 S.W.2d 103 (Tex. App. Corpus Christi 1990), writ denied, (Feb. 13, 1991).
- 5 [Hickey v. Couchman](#), 797 S.W.2d 103 (Tex. App. Corpus Christi 1990), writ denied, (Feb. 13, 1991).
- 6 [Carver v. Sheriff of La Salle County](#), 203 Ill. 2d 497, 272 Ill. Dec. 312, 787 N.E.2d 127 (2003) (statute established indemnification only where the judgment was entered in a personal capacity rather than official-capacity actions in which the office of sheriff was held responsible).
- 7 [Am. Jur. 2d, Public Officers and Employees § 322](#).
- 8 [State ex rel. Nixon v. Russell](#), 45 S.W.3d 487 (Mo. Ct. App. W.D. 2001).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 64

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Sheriffs, Police, and Constables

Romualdo P. Eclavea, J.D. and Alan J. Jacobs, J.D.

VII. Civil Liability

C. Defenses

§ 64. Governmental immunity

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  98(1) to 98(5)

Trial Strategy

[Proof of Qualified Immunity Defense in 42 U.S.C.A. sec. 1983 or Bivens Actions Against Law Enforcement Officers, 59 Am. Jur. Proof of Facts 3d 291](#)

Immunity in connection with peace officers is referred to as "qualified" immunity, "official" immunity, and "absolute" immunity. For the purposes of a claim of sovereign immunity, various activities, such as the provision of police services and the erection and operation of prisons and jails, are "governmental functions."¹

A sheriff sued in an individual capacity as well as in an official capacity may properly assert the defense of qualified immunity in his or her individual capacity.² A ruling in favor of qualified immunity requires:

- (1) identification of the specific right allegedly violated;
- (2) a determination whether, at the time of the alleged violation, the right was clearly established; and
- (3) if so, then a determination whether a reasonable person in the officer's position would have known that the officer's actions violated that right.³

When officers are sued for their conduct in the line of duty, courts must balance two competing needs: (1) the need to hold public officials accountable when they exercise power irresponsibly, and (2) the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.⁴

Practice Tip:

An undersheriff was not entitled to qualified immunity from suit on an equal protection claim that he failed to enforce a permanent protection order in favor of a lesbian domestic violence victim in the same manner as he enforced another protection order in favor of a heterosexual victim. The undersheriff was not able to show a rational basis for such discrimination, and a citizen's right not to have police discriminate in providing protection is clearly established. No reasonable officer could have believed discriminatory enforcement to be lawful.⁵

To establish the defense of "official immunity," the peace officer's actions must have been discretionary actions, taken in good faith as determined by the standard of a reasonably prudent officer under the same or similar circumstances.⁶ A sheriff and chief jailer could assert the complete defense of official immunity against the state constitutional claims of a prisoner who was subdued by a lieutenant sheriff after the prisoner created a disturbance.⁷ Additionally, a sheriff's lieutenant is entitled to assert the defenses of official and qualified immunity against a state law claim asserted by such a prisoner where quelling the disturbance was within the scope of the lieutenant's authorized duties; the lieutenant's position required the exercise of discretion; and there was no evidence that the lieutenant's actions were willful, malicious, or corrupt.⁸ A police officer who applies for a search warrant that is not supported by reasonable cause is immune from liability for damages if a reasonable officer could have believed that there was probable cause to support the application.⁹

Observation:

A criminal court's holding that a search warrant affidavit failed to indicate probable cause does not collaterally estop a peace officer from raising the defense of qualified immunity, provided that the officer is not in privity with the state in the criminal case, the issues in each case are not identical, and applying issue preclusion means that suppression would automatically trigger § 1983 liability.¹⁰

Immunity is not absolute and will not shield a sheriff or other peace officer who, because of misfeasance, has stepped outside the scope of the officer's authority.¹¹ In addition, the immunity may only extend to discretionary acts within the scope of a peace officer's duties and not to the negligent performance of ministerial duties.¹² Discretionary-function immunity for a county sheriff's employees may exclude from its application the circumstance where the employee acts willfully, intentionally,

maliciously, in bad faith, or beyond their authority.¹³ Even though the relevant law may be complex and difficult to apply, where the law is clearly established, a sheriff is not immune from the consequences of violating it.¹⁴

Practice Tip:

Officers who allegedly apprehended a motorist, after coming to the motorist's home to issue citations for traffic violations, and threw him against his car were not entitled to qualified immunity from the motorist's action alleging excessive force because the motorist's right to be free from such conduct is clearly established.¹⁵ On the other hand, a county sheriff's deputies were entitled to official immunity from an arrestee's state law claims for assault and battery arising from their "take down" of the arrestee in a transitional area of a county detention center, since the deputies had no reason to believe any use of force on the arrestee was prohibited, and thus, they did not commit a willful or malicious wrong.¹⁶

Under the statutory frameworks of some jurisdictions, the governmental unit employing the sheriff or other peace officer is not necessarily liable for wrongful acts even though the officer is;¹⁷ under others, the sheriff or other peace officer may be included in a definition providing for the waiver of sovereign immunity in limited instances.¹⁸

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Footnotes

- 1 [Price v. Davis](#), 132 N.C. App. 556, 512 S.E.2d 783 (1999).
- 2 [Guest v. Leis](#), 255 F.3d 325, 2001 FED App. 0206P (6th Cir. 2001).
- 3 [Lee v. Greene](#), 114 N.C. App. 580, 442 S.E.2d 547 (1994).
- 4 [Johnson v. Bay Area Rapid Transit Dist.](#), 724 F.3d 1159 (9th Cir. 2013).
- 5 [Price-Cornelison v. Brooks](#), 524 F.3d 1103 (10th Cir. 2008).
- 6 [Hidalgo County v. Gonzalez](#), 128 S.W.3d 788 (Tex. App. Corpus Christi 2004) (deputy's decision to restrain and handcuff patient in light of patient's hostile resistance was discretionary action, and officer's good faith was established because reasonably prudent officer, under same or similar circumstances, could have believed that decision to restrain and handcuff patient was justified based on information officer possessed when conduct occurred).
- 7 [Alford v. Osei-Kwasi](#), 203 Ga. App. 716, 418 S.E.2d 79 (1992).
- 8 [Alford v. Osei-Kwasi](#), 203 Ga. App. 716, 418 S.E.2d 79 (1992).
- 9 [Anderson v. Creighton](#), 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).
- 10 [Gentile v. Bauder](#), 718 So. 2d 781 (Fla. 1998).
- 11 [Teddy's Drive In, Inc. v. Cohen](#), 47 N.Y.2d 79, 416 N.Y.S.2d 782, 390 N.E.2d 290 (1979).
- 12 [Keener v. Kimble](#), 170 Ga. App. 674, 317 S.E.2d 900 (1984); [Jeffres v. Countryside Homes of Lincoln, Inc.](#), 214 Neb. 104, 333 N.W.2d 754 (1983).
- 13 [Johnson v. Milliner](#), 65 F. Supp. 3d 1295 (S.D. Ala. 2014) (applying Alabama statutory law).
- 14 [Garcia v. Reeves County, Tex.](#), 32 F.3d 200 (5th Cir. 1994).
- 15 [Hummel v. City of Carlisle](#), 229 F. Supp. 2d 839 (S.D. Ohio 2002).
- 16 [Farkarlun v. Hanning](#), 855 F. Supp. 2d 906, 87 Fed. R. Evid. Serv. 1112 (D. Minn. 2012).

17 [Clinton County v. Kramarsky, 90 A.D.2d 649, 456 N.Y.S.2d 264 \(3d Dep't 1982\).](#)

18 [Beard v. Hambrick, 396 So. 2d 708 \(Fla. 1981\).](#)

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VII. Civil Liability

C. Defenses

§ 65. Instructions to officer

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  98(1) to 98(5)

Officers can defend against failure to perform their duties in the execution of process when sued by plaintiffs in execution by showing that their omissions were due to the conduct or instructions of plaintiffs or their attorneys of record.¹ Where state law requires a sheriff to execute certain documents pursuant to a facially valid judgment of divorce, the sheriff has absolute quasi-judicial immunity from an action alleging that the wife effected the sheriff's action by submitting perjurious affidavits to the sheriff, thereby inducing the sheriff to act.²

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Footnotes

- ¹ [555, Inc. v. Barlow](#), 3 Ark. App. 139, 623 S.W.2d 843 (1981).
As to burden of proof where officer defends on grounds of instructions by plaintiffs, see [§ 137](#).
- ² [Tornheim v. Eason](#), 363 F. Supp. 2d 674 (S.D. N.Y. 2005), *aff'd*, 175 Fed. Appx. 427 (2d Cir. 2006).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 66

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VII. Civil Liability

C. Defenses

§ 66. Justification under writ; writ regular on face

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  98(1) to 98(5)

A sheriff, constable, or other such officer may justify official acts by showing that, in performing them, the officer acted pursuant to the command of a writ regular upon its face and issued by a court of competent jurisdiction¹ even if the judgment or order was erroneously issued² or otherwise void.³ The common-law rule may be codified by statute.⁴

A peace officer is similarly protected and justified in executing process fair on its face if subsequently charged with false arrest or imprisonment.⁵ In an action for false imprisonment, a deputy may be liable in an official capacity where there is no probable cause for the arrest,⁶ but no liability results, even where the officer only negligently believes there is probable cause to arrest a plaintiff, particularly where the plaintiff presents no evidence showing that the officer's actions were intended to be prejudicial or injurious.⁷

Comment:

As formulated in the Restatement Second, Torts, a sheriff or other law enforcement officer is privileged to commit acts which would otherwise be a trespass to chattel or conversion when acting pursuant to a court order that is valid or fair on its face.⁸ A writ is fair on its face if: (1) it is regular in form; (2) the court issuing it has authority to issue writs of such character, although it did not have authority to issue the particular writ, or although one or more of the proceedings required for its proper issuance have not taken place; and (3) the chattels described in the writ are within the territorial jurisdiction of the court.⁹ To be valid, a court order must meet three requirements: (1) it must be regular in form; (2) it must be issued by a court having authority to issue the

particular writ and having jurisdiction over the chattels described in it; and (3) all proceedings required for the proper issuance of the writ must have duly taken place.¹⁰

An officer's inquiry as to the validity of the process to be served is limited to an examination of the instrument itself to determine that it is properly signed, properly directed, and properly returnable.¹¹

Where process is in due form and comes from a court of general jurisdiction over the subject matter, the officer is justified in acting according to its tenor even if irregularities making the process voidable have previously occurred.¹²

The defense that a sheriff, constable, marshal, or other such officer was acting pursuant to a writ regular upon its face, and issued by a court of competent jurisdiction, is not available where the officer levies upon the goods of a stranger to the writ. A writ directing an officer to seize property of the defendant gives no right to take the property of a third person, and affords no protection if, acting under that writ, the officer seizes goods belonging to and in the possession of a third person.¹³ As to United States marshals, neither the official character of a United States marshal nor a valid writ of attachment under which the marshal acted affords the marshal any defense to a private action of trespass by a person, not the defendant named in the writ, whose property has been wrongfully taken under color of the writ.¹⁴ However, a strict application of this rule would work a hardship upon a sheriff, where the writ of process described property which was strikingly similar to the plaintiff's own property, and was initiated by a creditor who knew at the time of the initiation that such property was not in the state but failed to include any covering instruction that might aid the sheriff in the execution of duties. Under such circumstances, it was the primary conduct of the creditor, rather than the sheriff, which brought about the overreaching attachment.¹⁵

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Footnotes

- 1 Marks v. Shoup, 181 U.S. 562, 21 S. Ct. 724, 45 L. Ed. 1002, 1 Alaska Fed. 702 (1901); Jeffres v. Countryside Homes of Lincoln, Inc., 214 Neb. 104, 333 N.W.2d 754 (1983).
- 2 Teddy's Drive In, Inc. v. Cohen, 47 N.Y.2d 79, 416 N.Y.S.2d 782, 390 N.E.2d 290 (1979).
- 3 Reinecke v. Sheehy, 47 Mich. App. 250, 209 N.W.2d 460 (1973).
- 4 Brother's Distributing Co., Inc. v. Heidtman, 354 F. Supp. 203 (S.D. Fla. 1973), aff'd, 480 F.2d 922 (5th Cir. 1973) (statute setting forth the duty of a sheriff to levy upon property described in a writ may specifically grant immunity from suit to sheriffs levying attachment on the property).
- 5 As to false imprisonment, see Am. Jur. 2d, False Imprisonment[Westlaw®(r) Search Query].
- 6 Marlowe v. Piner, 119 N.C. App. 125, 458 S.E.2d 220 (1995).
- 7 Marlowe v. Piner, 119 N.C. App. 125, 458 S.E.2d 220 (1995).
- 8 Restatement Second, Torts § 266 (1965).
- 9 Yeager v. Hurt, 433 So. 2d 1176 (Ala. 1983) (citing Restatement Second, Torts § 266, Comment b) (1965).
- 10 Yeager v. Hurt, 433 So. 2d 1176 (Ala. 1983) (citing Restatement Second, Torts § 266, Comment b) (1965).
- 11 Fleming v. McEnany, 491 F.2d 1353 (2d Cir. 1974).
- 12 Marks v. Shoup, 181 U.S. 562, 21 S. Ct. 724, 45 L. Ed. 1002, 1 Alaska Fed. 702 (1901).
- 13 North v. Peters, 138 U.S. 271, 11 S. Ct. 346, 34 L. Ed. 936 (1891).
- 14 Lammon v. Feusier, 111 U.S. 17, 4 S. Ct. 286, 28 L. Ed. 337 (1884).

15

Ray v. City Bank & Trust Co. of Natchez, Miss., 358 F. Supp. 630, 36 Ohio Misc. 83, 65 Ohio Op. 2d 112, 13 U.C.C. Rep. Serv. 355 (S.D. Ohio 1973).

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VII. Civil Liability

C. Defenses

§ 67. Failure to levy process

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  98(1) to 98(5)

A sheriff cannot be held liable for loss resulting from failure or refusal to act upon an invalid execution.¹ Nor is there a neglect of duty on the part of the peace officer charged with serving process which would give a judgment debtor a cause of action against the officer, where the peace officer serves process against a judgment debtor in the manner provided by law for such cases, and which is subsequently held for the first time to be insufficient service.² And the sheriff is justified in refusing to make a levy based on an execution which fails to comply with the applicable statute; the sheriff's refusal to make such a levy does not render the sheriff liable for money damages to the judgment creditor.³ Moreover, a sheriff is under no duty to detect, and to inform the judgment creditor's attorney of, any fatal legal defect in the execution; thus, the sheriff is not equitably estopped from relying in defense upon that defect.⁴

A peace officer may show, in defense of a failure to levy process, that the judgment debtor had filed a petition or received a discharge in bankruptcy,⁵ or that the officer could find no property subject to levy belonging to the judgment debtor whether or not the officer is indemnified.⁶

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Footnotes

- ¹ [Central Maine Charter Corp. v. Wright](#), 412 A.2d 69 (Me. 1980).
- ² [Fain v. Hutto](#), 236 Ga. 915, 225 S.E.2d 893 (1976).
- ³ [Freedom Discount Corp. v. McMahon](#), 38 A.D.2d 947, 331 N.Y.S.2d 489 (2d Dep't 1972).
- ⁴ [Central Maine Charter Corp. v. Wright](#), 412 A.2d 69 (Me. 1980).

- 5 [Ortiz v. M & M Sales Co.](#), 656 S.W.2d 554 (Tex. App. Corpus Christi 1983), writ refused n.r.e., (Nov. 16, 1983).
- 6 [Pickens v. Baker](#), 588 S.W.2d 406 (Tex. Civ. App. Amarillo 1979).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 68

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VII. Civil Liability

C. Defenses

§ 68. Failure to make return

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  98(1) to 98(5)

The liability of the sheriff for the failure to return an execution is governed by statute in many states; because such statutes may be highly penal, very slight circumstances may exempt officers from their operation.¹ Obeying the instructions given by the execution creditor, or by such creditor's attorney of record, may provide a reasonable excuse for the officer's delay or failure to return an execution.² The sheriff's failure to make a return may also be absolved where the inappropriate use of force would have been necessary to make the return.³

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Footnotes

- 1 [Bonds v. Bonds](#), 453 So. 2d 1020 (Miss. 1984).
- 2 [§ 65](#).
- 3 [Red House Furniture Co. v. Smith](#), 310 N.C. 617, 313 S.E.2d 569 (1984).

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VIII. Liability of Sureties on Official Bonds

A. Overview


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Research References

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  154 to 158.5, 163

A.L.R. Library

A.L.R. Index, Bonds and Undertakings
A.L.R. Index, Color of Right, Title, and Office
A.L.R. Index, Constables
A.L.R. Index, Deputies
A.L.R. Index, Judicial and Execution Sales
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A.L.R. Index, Public Officers and Employees
A.L.R. Index, Sheriffs
A.L.R. Index, Suretyship
West's A.L.R. Digest, [Sheriffs and Constables](#)  154 to 158.5, 163

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VIII. Liability of Sureties on Official Bonds

A. Overview

1. In General

§ 69. Peace officer's bond, generally

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  154

Forms

Forms Regarding Sheriffs' Bonds, see Am. Jur. Legal Forms 2d, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

An official bond is collateral security for the faithful performance of an officer in the discharge of official duties.¹ It is usually required of a sheriff or constable upon taking office.² A sheriff waives governmental immunity by purchasing a surety bond, and the purchase of the bond precludes the sheriff from relying upon the protective embrace of governmental immunity so long as the surety is joined as a party to the action and only to the extent of the amount of the bond.³ It is an obligation binding the surety of a bond to make good any default of that officer⁴ and generally covers liability based upon acts or omissions that constitute intentional or malicious abuse of power.⁵ A bonding statute applicable to sheriffs provides a plaintiff with a statutory cause of action in addition to a common law cause of action.⁶

A plaintiff may maintain a suit against a sheriff or other officer and surety on their official bond for acts of negligence in performance of their official duties since the purpose of the bond is to ensure that all persons are made secure in their rights and have an adequate remedy for wrongs done to them.⁷

An injured person who has recovered judgment against a sheriff and has had an execution returned unsatisfied may bring action directly against the surety on the bond, which the sheriff is required by statute to execute to answer all damages arising from performance of the job.⁸

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Footnotes

- 1 [State ex rel. Mayle v. Aetna Cas. & Sur. Co.](#), 152 W. Va. 683, 166 S.E.2d 133 (1969).
- 2 [§ 15.](#)
- 3 [Russ v. Causey](#), 732 F. Supp. 2d 589 (E.D. N.C. 2010), [aff'd in part](#), 468 Fed. Appx. 267 (4th Cir. 2012) (applying North Carolina law); [White v. Cochran](#), 229 N.C. App. 183, 748 S.E.2d 334 (2013).
- 4 [State ex rel. Mayle v. Aetna Cas. & Sur. Co.](#), 152 W. Va. 683, 166 S.E.2d 133 (1969).
[As to damages recoverable in an action on an officer's bond, generally, see §§ 153, 154.](#)
- 5 [Jemison v. Crichlow](#), 139 A.D.2d 332, 531 N.Y.S.2d 919 (2d Dep't 1988), [order aff'd](#), 74 N.Y.2d 726, 544 N.Y.S.2d 813, 543 N.E.2d 78 (1989).
- 6 [Sellers v. Rodriguez](#), 149 N.C. App. 619, 561 S.E.2d 336 (2002).
- 7 [Smith v. Phillips](#), 117 N.C. App. 378, 451 S.E.2d 309 (1994).
- 8 [Antinerella v. Rioux](#), 44 Conn. Supp. 368, 690 A.2d 450 (Super. Ct. 1995).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 70

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VIII. Liability of Sureties on Official Bonds

A. Overview

1. In General

§ 70. Principles governing rights and liability of surety

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  155 to 158

The liability of a surety on a sheriff's bond is limited by the penalty of the bond and is otherwise the same as that of the principal.¹ The right of the surety on a sheriff's official bond to reimbursement from the sheriff after payment of a judgment against the sheriff also reflects the principles applicable to sureties generally as to reimbursement from the principal.²

In general, the purpose of a sheriff's official bond is to provide indemnity against malfeasance and misbehavior in office; the misuse of powers belonging to the office; and the assumption, under guise of official action, of powers not belonging to it.³ All acts so performed, though unlawful or wrongful, are official acts within the meaning of an undertaking that an officer will faithfully and impartially discharge the duties of office and, as such, they may be reasonably considered to have been within the contemplation of the sureties at the time they entered into the undertaking, thus constituting a breach of its conditions.⁴ Thus, if an officer is not liable, the surety cannot be held liable.⁵

The surety on a peace officer's official bond is not liable for those acts done by the peace officer in an individual capacity as distinguished from those done under direction of a court or pursuant to a statute.⁶ Stated differently, sureties on the bonds of sheriffs or constables are not liable for their personal acts or wrongs where they are not done by virtue of their offices or under color of office.⁷

Reminder:

Because the surety on a peace officer's official bond may be a foreign corporation, the practitioner seeking to invoke the surety's liability on the bond must be alert to statutes regulating venue in this type of action.⁸ For instance, the applicable statute may require that the action be brought where the bond was made, which may be the county where the sheriff and deputy have their official residence or where the bonds were filed.⁹

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Footnotes

- 1 [State ex rel. Mayle v. Aetna Cas. & Sur. Co.](#), 152 W. Va. 683, 166 S.E.2d 133 (1969).
As to extent of liability generally, see § 71.
As to the procedural aspects of actions on a peace officer's bonds, see § 101.
As to liability of sureties, generally, see Am. Jur. 2d, Suretyship[[Westlaw®\(r\) Search Query](#)].
- 2 [State ex rel. County Com'n of Jackson County v. McCoy](#), 170 W. Va. 174, 291 S.E.2d 670 (1982).
As to rights and remedies of sureties against principal or indemnitor, see Am. Jur. 2d, Suretyship[[Westlaw®\(r\) Search Query](#)].
- 3 [Cassady v. Sholtz, for Use and Benefit of Edwards](#), 124 Fla. 718, 169 So. 487 (1936); [Aetna Cas. & Sur. Co. v. Clark](#), 136 Tex. 238, 150 S.W.2d 78 (Comm'n App. 1941).
- 4 [Cassady v. Sholtz, for Use and Benefit of Edwards](#), 124 Fla. 718, 169 So. 487 (1936); [Bostatter v. Hinchman](#), 243 Mich. 589, 220 N.W. 775 (1928).
- 5 [Wommack v. Lesh](#), 180 Kan. 548, 305 P.2d 854 (1957); [State ex rel. Mayle v. Aetna Cas. & Sur. Co.](#), 152 W. Va. 683, 166 S.E.2d 133 (1969).
As to requirement that principal be liable, see Am. Jur. 2d, Suretyship[[Westlaw®\(r\) Search Query](#)].
- 6 [State ex rel. Penrod v. French](#), 222 Ind. 145, 51 N.E.2d 858, 149 A.L.R. 1084 (1943); [Dunham v. Hartman](#), 153 Mo. 625, 55 S.W. 233 (1900).
As to proper parties in action upon officer's bond, generally, see §§ 107, 108.
- 7 [People v. Pacific Sur. Co.](#), 50 Colo. 273, 109 P. 961 (1910); [Davis v. Hall](#), 72 Or. 220, 143 P. 893 (1914).
- 8 As to effect of residence, domicile, or place of business upon venue, see Am. Jur. 2d, Venue.[[Westlaw®\(r\) Search Query](#)]
- 9 [O'Neal v. DeKalb County](#), 531 S.W.2d 296 (Tenn. 1975).

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A. Overview

1. In General

§ 71. Extent of liability

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  158

The liability of the sureties on the official bond of a sheriff is limited, as a general rule, to the amount of the penalty,¹ and it cannot be extended so as to include exemplary or punitive damages.² A surety is not liable for the amount of damages granted against a sheriff when the full amount of the bond had been exhausted by the payment of a prior judgment against the sheriff.³

In the absence of express statutory conditions, such bonds are intended for indemnity, rather than as a penalty, and are not to be subject to forfeiture in full for the sheriff's failure to faithfully perform the duties pertaining to office, without reference to any definite pleaded or proved amount of damages arising therefrom.⁴ Thus, while the officer is liable for the full amount of the damages regardless of the amount of the bond, the excess cannot be recovered in an action upon the bond against the sureties.⁵

Some courts have found that the surety is liable to all persons unlawfully injured by nonfeasance, misfeasance, or malfeasance perpetrated by the sheriff or other officer,⁶ or, as is sometimes said, by any unlawful act done under color of or by virtue of office.⁷

A sheriff with varied responsibilities may be required to give more than one bond, with each separate bond relating to the performance of duties in different capacities. For example, one jurisdiction requires that the sheriff post a bond for the faithful performance of duties in the capacity of sheriff in the amount set forth by statute while another provision requires the sheriff to give bond for the faithful performance of duties as an ex officio tax collector in another amount.⁸ Under such a statute, the bond posted for the actions of the sheriff in the capacity of ex officio tax collector was applicable only to the sheriff's actions as such, and the surety on that bond was not responsible for the sheriff's actions as sheriff.⁹

Observation:

Such a statutory framework is not a violation of equal protection, because each citizen is protected to the equal extent of the amount of the sheriff's bond covering the duties as sheriff, and each citizen is also equally protected to the amount of the bond posted for the actions of the sheriff in the capacity of ex officio tax collector.¹⁰

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Footnotes

- 1 [Humphreys v. Leggett](#), 50 U.S. 297, 9 How. 297, 13 L. Ed. 145, 1850 WL 6922 (1850).
- 2 [Johnson v. Williams' Adm'r](#), 111 Ky. 289, 23 Ky. L. Rptr. 658, 63 S.W. 759 (1901).
- 3 [Layman ex rel. Layman v. Alexander](#), 343 F. Supp. 2d 483 (W.D. N.C. 2004) (applying North Carolina law).
- 4 [State ex rel. Switzer v. Overturff](#), 239 Iowa 1039, 33 N.W.2d 405, 4 A.L.R.2d 1343 (1948).
- 5 [Albie v. Jones](#), 82 Ark. 414, 102 S.W. 222 (1907).
- 6 [Kosowsky v. Fidelity & Deposit Co. of Md.](#), 245 Mich. 266, 222 N.W. 153 (1928); [American Guaranty Co. v. McNiece](#), 111 Ohio St. 532, 3 Ohio L. Abs. 10, 146 N.E. 77, 39 A.L.R. 1289 (1924).
- 7 [Lee v. Charmley](#), 20 N.D. 570, 129 N.W. 448 (1910); [State ex rel. Verdis v. Fidelity & Cas. Co. of New York](#), 120 W. Va. 593, 199 S.E. 884 (1938).
- 8 [Brown v. Edwards](#), 321 So. 2d 394 (La. Ct. App. 1st Cir. 1975).
- 9 [Brown v. Edwards](#), 321 So. 2d 394 (La. Ct. App. 1st Cir. 1975).
- 10 [Brown v. Edwards](#), 321 So. 2d 394 (La. Ct. App. 1st Cir. 1975).

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VIII. Liability of Sureties on Official Bonds

A. Overview

1. In General

§ 72. Conclusiveness of judgment against principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  158.5

A judgment against the principal on an official bond is conclusive against the sureties, in the absence of fraud or collusion, although they had no notice of suit, where, by the express terms of their agreement, or by reasonable implication from the very nature and intent of their obligation, they have stipulated to pay the damages and costs which may be recovered against their principal or otherwise have agreed to abide by the decree or judgment of a court against the principal.¹ This is true where sheriffs, constables, or marshals are the public officers involved. One case holds that the judgment against the sheriff is conclusive against the sureties.² In some jurisdictions, the judgment against the sheriff is not conclusive as against a surety, but is considered to be prima facie evidence of the fact of the judgment, its amount and cause of action upon which it was based,³ or prima facie evidence of ownership of the property and of its value.⁴

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Footnotes

- ¹ [Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co.](#), 412 Pa. 222, 194 A.2d 423 (1963).
- ² [Slattery v. Schapero](#), 217 Mass. 71, 104 N.E. 440 (1914).
- ³ [MacDonald v. Standard Acc. Ins. Co.](#), 19 Conn. Supp. 257, 111 A.2d 347 (Super. Ct. 1955).
- ⁴ [State ex rel. and to Use of Tate v. Baird](#), 186 S.W. 587 (Mo. Ct. App. 1916).

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1. In General

§ 73. Defenses of sureties in action on officer's bond

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  163

Because the liability of the surety on an official bond is coextensive with that of the principal,¹ sureties may plead such defenses as payment.² It is also a complete defense, in an action against a constable and the sureties on an official bond to recover the statutory penalty for refusal by the officer to sell property levied upon under execution, to show that the property in question was seized under bankruptcy proceedings, instituted by the judgment debtor, before the arrival of the day to which the execution sale had been adjourned.³

Caution:

A surety of a sheriff that relies upon the defense of the sheriff is without defense if that of the sheriff fails.⁴

- 1 As to extent of liability of surety on official bond, generally, see § 71.
- 2 *Humphreys v. Leggett*, 50 U.S. 297, 9 How. 297, 13 L. Ed. 145, 1850 WL 6922 (1850).
- 3 *Mayfield Woolen Mills v. Lewis*, 89 Ark. 488, 117 S.W. 558 (1909).
- 4 *Geros v. Harries*, 65 Utah 227, 236 P. 220, 39 A.L.R. 1297 (1925).

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A. Overview

1. In General

§ 74. Effect of failure of officer to sign as principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  154

The failure of a sheriff, constable, or other such officer to sign an official bond as principal does not exonerate the sureties from liability.¹ The surety may estop itself by its conduct from denying liability upon the bond notwithstanding the lack of the officer's signature.²

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Footnotes

¹ [Whitlock v. Wood](#), 193 Ark. 695, 101 S.W.2d 950, 110 A.L.R. 955 (1937).

² [Whitlock v. Wood](#), 193 Ark. 695, 101 S.W.2d 950, 110 A.L.R. 955 (1937).

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70 Am. Jur. 2d Sheriffs, Police, and Constables § 75

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VIII. Liability of Sureties on Official Bonds

A. Overview

2. Construction of Sureties' Obligation

§ 75. Strict construction, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#) 🔑 158

The liability of the sureties on a sheriff's or constable's official bond is to be determined by the terms of the bond itself, and such terms cannot be extended beyond their reasonable meaning, with reference to the purposes contemplated by the law requiring the bond.¹ Liability under a peace officer's official bond is not to be extended by implication or construction, because it is strictly construed,² and the obligation that the sureties assume refers only to such liabilities as arise within the fair intentment and meaning of the obligation itself.³ The obligation is not an engagement for general good behavior on the peace officer's part aside from the officer's official duty.⁴ Thus, the bond of a sheriff is not liable at the suit of third persons unless the officer is expressly bound to it by the duty of office.⁵ A sheriff's bond for faithful accounting for all public and other funds or property does not cover claims based on a detainee's care while in custody.⁶ All statutory requirements will be considered as included in the terms, and all nonstatutory provisions will be read out.⁷ In addition, absent any previous case in the state holding that the surety on the sheriff's bond (which merely requires that the sheriff faithfully execute the laws) is liable for negligent acts which are committed by a deputy sheriff while the sheriff is on the way to investigate or to perform a law enforcement function, a construction of the bond to make the surety liable in automobile accident cases would be an unconstitutional impairment of the plain words of the contract the surety entered into when writing the bond.⁸

Observation:

The court commented in the case above that the legislature did not intend that the sheriff's bond for the faithful discharge of duties was to serve as an automobile liability policy. Otherwise, the legislature would not have provided in another provision that the budget of the sheriff must include amounts for insurance protection of the sheriff and deputies.⁹

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Footnotes

- 1 [Albie v. Jones](#), 82 Ark. 414, 102 S.W. 222 (1907); [Jennings v. Bode](#), 51 Fla. 229, 40 So. 194 (1906).
As to the well-established rule applicable to the construction of official bonds of public officers, see Am. Jur. 2d, Public Officers and Employees[[Westlaw®\(r\) Search Query](#)].
- 2 [Jennings v. Bode](#), 51 Fla. 229, 40 So. 194 (1906); [Jersey City v. Schoppe](#), 82 N.J.L. 697, 82 A. 913 (N.J. Ct. Err. & App. 1912).
- 3 [Cassady v. Sholtz](#), for Use and Benefit of Edwards, 124 Fla. 718, 169 So. 487 (1936); [McPhee v. U.S. Fidelity & Guar. Co.](#), 52 Wash. 154, 100 P. 174 (1909).
- 4 [Cassady v. Sholtz](#), for Use and Benefit of Edwards, 124 Fla. 718, 169 So. 487 (1936).
The sureties for an officer are liable only in the event of a failure to perform the officer's duty. [Jersey City v. Schoppe](#), 82 N.J.L. 697, 82 A. 913 (N.J. Ct. Err. & App. 1912).
- 5 [Cassady v. Sholtz](#), for Use and Benefit of Edwards, 124 Fla. 718, 169 So. 487 (1936); [McPhee v. U.S. Fidelity & Guar. Co.](#), 52 Wash. 154, 100 P. 174 (1909).
- 6 [Keele v. Glynn County, Ga.](#), 938 F. Supp. 2d 1270 (S.D. Ga. 2013) (applying Georgia law).
- 7 [State ex rel. Switzer v. Overturff](#), 239 Iowa 1039, 33 N.W.2d 405, 4 A.L.R.2d 1343 (1948).
- 8 [Poole v. Brunt](#), 338 So. 2d 991 (Miss. 1976).
- 9 [Poole v. Brunt](#), 338 So. 2d 991 (Miss. 1976).

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2. Construction of Sureties' Obligation

§ 76. Effect of technical errors

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The failure of town authorities to make a record of the execution and acceptance of a marshal's bond will not prevent its enforcement if it was in fact properly executed, accepted, and placed on file.¹

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¹ [Growbarger v. U.S. Fidelity & Guaranty Co.](#), 126 Ky. 118, 31 Ky. L. Rptr. 555, 102 S.W. 873 (1907).

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A. Overview

3. Deputy Officer's Bond

§ 77. Deputy officer's bond generally

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Forms

Forms Regarding Sheriffs' Bonds, see Am. Jur. Legal Forms 2d, Police, Sheriffs, and Constables [\[Westlaw®\(r\) Search Query\]](#)

Because a surety cannot be held liable upon an invalid contract,¹ the bond of a deputy sheriff conditioned for the faithful performance of duty, and containing a reference to a contract between the deputy sheriff and the sheriff, which is illegal under statutes prohibiting the sale or farming out of any officer under the laws of the state, is void as to the private interest of the sheriff and deputy.²

Observation:

Under a statute requiring the posting of bond for the performance of services by deputy sheriffs, amended to authorize specifically the acceptance of a blanket surety bond conditioned upon the faithful performance of the duties of the deputy sheriffs appointed by a sheriff, the county commission was not required to approve on an individual basis each deputy sheriff's bond.³

A deputy sheriff's surety cannot be liable for a greater amount than the principal.⁴

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Footnotes

- 1 [Am. Jur. 2d, Suretyship § 79.](#)
- 2 [White v. Cook, 51 W. Va. 201, 41 S.E. 410 \(1902\).](#)
[As to liability of sureties on a peace officer's bond for the acts of the officer's deputy, see § 78.](#)
- 3 [Wintenberg v. State, 378 So. 2d 854 \(Fla. 4th DCA 1979\).](#)
- 4 [State ex rel. Mayle v. Aetna Cas. & Sur. Co., 152 W. Va. 683, 166 S.E.2d 133 \(1969\).](#)

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A. Overview

3. Deputy Officer's Bond

§ 78. Liability of officer's surety for acts of deputy

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West's Key Number Digest, [Sheriffs and Constables](#)  157(3)

Because the liability of the surety on a peace officer's bond depends upon the liability of the principal,¹ the liability of the sureties on a peace officer's bond for the acts of the officer's deputy may vary in accordance with the rules adopted in the jurisdiction as to the liability of the sheriff for the acts of a deputy generally.² Even where the peace officer is found to be liable for the acts of a deputy, the liability of the surety is limited by the terms of the bond,³ and if the terms of the bond do not impose liability for negligent acts of the deputy unconnected with process, the sheriff is not liable for such an act by the deputy.⁴

However, the liability of a sheriff's sureties is frequently given a wider scope.⁵ The surety on the official bond of a sheriff or other peace officer may, on a proper showing, be liable under the statute not only for misfeasance, but also for malfeasance, of the principal or a duly authorized and acting deputy.⁶ In addition, in cases where a sheriff or other peace officer was liable for damages resulting from the negligent operation of a motor vehicle by a subordinate,⁷ the courts have found the bondsperson also liable, treating the liability of the principal and surety as being identical, or construing the language of the bond as not relieving the surety of liability.⁸

Caution:

A bond may be construed as not covering automobile accidents.⁹

However, where a peace officer is not liable for the negligence of a deputy or deputy marshal in, for example, the operation of a motor vehicle, neither is the surety liable on the official bond.¹⁰

Where the condition of a marshal's bond is that the marshal and deputies must faithfully perform all the duties of the office, a marshal is liable in damages on the bond for an assault committed by a deputy in executing a writ of replevin.¹¹

Observation:

A statute may govern the matter. In one case, even though one statute made a surety company liable for any wrongful act committed under color of the principal's office, a subsequent and more specific statute that provided, in substance, that neither the sheriff nor surety would be liable for the acts of a deputy, even though acting by virtue of office, controlled, and the surety on the sheriff's official bond was not liable for acts committed by the sheriff's deputy.¹²

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Footnotes

- 1 As to liability of sheriff for acts of deputy, see §§ 56 to 62.
- 2 [Travelers Indem. Co. of Hartford, Conn. v. State ex rel. Favre](#), 154 Ind. App. 553, 290 N.E.2d 456 (1972).
- 3 As to liability of sheriff's surety for torts by deputy in making arrest, see § 87.
- 4 [Davis v. Moore](#), 215 N.C. 449, 2 S.E.2d 366 (1939) (overruled in part on other grounds by, [Dunn v. Swanson](#), 217 N.C. 279, 7 S.E.2d 563 (1940)).
- 5 [Davis v. Moore](#), 215 N.C. 449, 2 S.E.2d 366 (1939) (overruled in part on other grounds by, [Dunn v. Swanson](#), 217 N.C. 279, 7 S.E.2d 563 (1940)).
- 6 The bond of a sheriff constituted a contract between the sheriff as an individual and the state for the benefit of anyone who might suffer damage by reason of a failure to faithfully discharge the duties of sheriff, rendering the sheriff and bondsperson liable for the negligence of a deputy. [Magenheimer v. State ex rel. Dalton](#), 120 Ind. App. 128, 90 N.E.2d 813 (1950).
- 7 [Harwell v. Morris](#), 255 Ala. 344, 51 So. 2d 511 (1951).
- 8 A sheriff and surety can be liable on the sheriff's bond under statute for intentional or negligent acts of the sheriff's deputies where such acts did not involve malice or wantonness or willful misconduct. [Monroe v. Darr](#), 221 Kan. 281, 559 P.2d 322 (1977).
- 9 § 62.
- 10 [Hanratty v. Godfrey](#), 44 Ohio App. 360, 14 Ohio L. Abs. 246, 184 N.E. 842 (5th Dist. Delaware County 1932); [Rutledge v. Small](#), 192 S.C. 254, 6 S.E.2d 260 (1939).
- 11 If a deputy sheriff were acting in an official capacity at the time of an alleged false arrest, the deputy and a surety on the deputy's bond, as well as the sheriff and a surety on the sheriff's bond, would be proper and necessary parties to an action. [State ex rel. Cain v. Corbett](#), 235 N.C. 33, 69 S.E.2d 20 (1952).

- 9 Poole v. Brunt, 338 So. 2d 991 (Miss. 1976), discussed in § 75.
- 10 Waters v. McClary, 344 F.2d 75, 15 A.L.R.3d 1183 (6th Cir. 1965); McVey v. Gross, 11 F.2d 379 (N.D. Tex. 1926); Nelson v. Bartell, 4 Wash. 2d 174, 103 P.2d 30 (1940).
- 11 Palmer v. King, 41 App. D.C. 419, L.R.A. 1916D,278, Am. Ann. Cas. 1915C, 1139, 1914 WL 21732 (App. D.C. 1914).
- 12 Grundy County v. Dyer, 546 S.W.2d 577 (Tenn. 1977).

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VIII. Liability of Sureties on Official Bonds

B. Liability for Particular Acts

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Research References

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West's Key Number Digest, [Sheriffs and Constables](#) 🔑 157(4), 157(5)

A.L.R. Library

A.L.R. Index, Bonds and Undertakings
A.L.R. Index, Color of Right, Title, and Office
A.L.R. Index, Constables
A.L.R. Index, Deputies
A.L.R. Index, Judicial and Execution Sales
A.L.R. Index, Marshals
A.L.R. Index, Police and Law Enforcement Officers
A.L.R. Index, Public Officers and Employees
A.L.R. Index, Sheriffs
A.L.R. Index, Suretyship
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§ 79. Liability for particular acts; acts done by virtue of or under color of office

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West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

A.L.R. Library

[Immunity of Police or Other Law Enforcement Officer From Liability in Defamation Action, 100 A.L.R.5th 341](#)

It is well settled that the sureties of sheriffs, constables, and police officers are liable for acts done by virtue of their office.¹ As to a surety's liability for acts done under color of office, the authorities are in conflict. According to a number of courts, if the act is done under color of office but not by virtue of office, the sureties are not liable.² Other authorities have stated that the sureties of a sheriff, constable, or other such officer are generally held liable for acts done under color of office as well as for acts done by virtue of office.³ Moreover, some states which, by judicial decision, had adopted the distinction as to the liability of the surety between acts done under color of office and acts done by virtue of office have enacted statutes which make sureties liable for both types of acts.⁴

Definition:

Those acts of a sheriff, constable, or other such officer are by virtue of office, or virtute officii, which are within the authority of the officer, even though the officer exercises that authority improperly, or abuses the confidence that the law reposes in the officer, while acts done under color of office, or colore officii, are those which are of such a nature that the office gives the officer no authority to do them.⁵

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Footnotes

- 1 [Bassinger v. U.S. Fidelity & Guaranty Co.](#), 58 F.2d 573 (C.C.A. 8th Cir. 1932); [Palmer v. King](#), 41 App. D.C. 419, L.R.A. 1916D,278, [Am. Ann. Cas.](#) 1915C, 1139, 1914 WL 21732 (App. D.C. 1914).
- 2 [People v. Pacific Sur. Co.](#), 50 Colo. 273, 109 P. 961 (1910); [Jersey City v. Schoppe](#), 82 N.J.L. 697, 82 A. 913 (N.J. Ct. Err. & App. 1912).
- 3 [Dogarin v. Connor](#), 6 Ariz. App. 473, 433 P.2d 653 (1967); [Greenberg v. People](#), 225 Ill. 174, 80 N.E. 100 (1906).

The test should be whether the officer would have acted in the particular instance if the officer were not clothed with official character or would the officer have so acted if not an officer. If the officer assumed to act as an officer, the surety should be held. [City of Advance ex rel. Henley v. Maryland Cas. Co.](#), 302 S.W.2d 28 (Mo. 1957).

An off-duty police officer who displayed his shield, identified himself as a police officer to the arrestee, and drew his firearm, acted under color of law in taking the arrestee into custody for purposes of the arrestee's § 1983 action against the officer. [Jocks v. Tavernier](#), 316 F.3d 128 (2d Cir. 2003).

A deputy's use of racial slurs in official conversation with another deputy who was investigating an alleged trespass incident involving an African-American man was not the type of an official act performed under color of office that would permit a recovery on the deputy's bond where, at the time of the telephone conversation, the deputy had no official business with the man nor did the deputy attempt to exercise toward him any official authority. [Booth v. Firemen's Ins. Co. of Newark, New Jersey](#), 223 Ga. App. 243, 477 S.E.2d 376 (1996).
- 4 [State ex rel. Harbin v. Dunn](#), 39 Tenn. App. 190, 282 S.W.2d 203 (1943).

A deputy's acts deemed not to be official could not form a basis for imposition of liability on a bonding company, and recovery was available only for those acts of the deputy that were performed by virtue of or under color of office. [Booth v. Firemen's Ins. Co. of Newark, New Jersey](#), 223 Ga. App. 243, 477 S.E.2d 376 (1996).
- 5 [Feller v. Gates](#), 40 Or. 543, 67 P. 416 (1902); [Greenius v. American Sur. Co. of New York](#), 92 Wash. 401, 159 P. 384 (1916).

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B. Liability for Particular Acts

1. In General

§ 80. Levy

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West's Key Number Digest

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Forms

Complaints Regarding Attachment of Levy, see Am. Jur. Pleading and Practice Forms, Attachment and Garnishment[[Westlaw®\(r\) Search Query](#)]

Complaints Regarding Attachment of Levy, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables[[Westlaw®\(r\) Search Query](#)]

Neglect or failure to execute regular legal process is an official default for which the sureties of a sheriff or constable are liable.¹ The plaintiff in a suit against the sureties of a sheriff must, however, show damage sustained by the plaintiff through the sheriff's neglect or failure in the performance of official duties.² Sureties on an officer's bond are also ordinarily held liable where they fail to advise the judgment debtor of any statutory right to an exemption.³ The surety's liability to a judgment creditor for a constable's failure to execute a writ is limited to the penal sum of the constable's bond; the surety cannot be held liable for the full amount of the judgment.⁴

The sureties on a constable's official bond may be liable for a deputy's failure or refusal to levy upon or sell property subject to execution, under a statute providing that for such failure or refusal an officer and sureties must be liable to the party entitled to

receive the money collected on such execution for the full amount of the debt, interest, and costs even though a statute declares that sheriffs must be responsible for the official acts of their deputies, without making any similar provision as to constables.⁵

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Footnotes

- 1 [Pappe v. Law](#), 1934 OK 427, 169 Okla. 15, 35 P.2d 941, 95 A.L.R. 939 (1934).
As to liability of a sheriff for neglect or failure to make a levy, generally, see § 50.
- 2 [Com. v. McCoy](#), 8 Watts 153, 1939 WL 1620 (Pa. 1939).
- 3 [Dancer v. Chenault](#), 527 S.W.2d 714 (Mo. Ct. App. 1975).
- 4 [Abercia v. Kingvision Pay-Per-View, Ltd.](#), 217 S.W.3d 688 (Tex. App. El Paso 2007).
- 5 [Rich v. Graybar Elec. Co.](#), 125 Tex. 470, 84 S.W.2d 708, 102 A.L.R. 171 (Comm'n App. 1935).

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VIII. Liability of Sureties on Official Bonds

B. Liability for Particular Acts

1. In General

§ 81. Levy—On property of third person

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

The cases are in conflict as to the liability of the sureties on an official bond of the sheriff or other such officer who, without excuse, levies on the property of a stranger to the writ.¹ The sureties are not liable for seizures under writs, even though regular upon their face, which were issued against other parties.²

However, many cases find the sureties on the official bond of the sheriff, constable, or other such officer liable for the act of seizing property of a stranger to the writ whether such an act is regarded as one under color of office or one by virtue of office.³

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Footnotes

¹ As to liability for levy on goods of third party, generally, see [§ 49](#).

² [Albie v. Jones](#), 82 Ark. 414, 102 S.W. 222 (1907).

A law enforcement officer who levies execution on property owned by a person other than the judgment debtor named in the writ may be held responsible for the damages suffered by that innocent third person as a consequence of the wrongful levy. [Bethel v. Dunipace](#), 57 Ohio App. 3d 89, 566 N.E.2d 1252 (3d Dist. Hancock County 1988).

³ [Martin v. Buffaloe](#), 128 N.C. 305, 38 S.E. 902 (1901).

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§ 82. Making of return

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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A failure to make a return of execution or other process on the day fixed as the return day is, according to the general rule, a breach of the official bond of a sheriff or constable.¹ Under particular circumstances, however, an officer's bond may not be liable for failure to file a return of the writ after a seizure of the property.²

The remedy of a party who claims the sheriff's return is false is also an action against the sheriff on the bond.³

Sureties have been absolved from liability for a false return where there was a waiver of all right to challenge the return of the officer in any court other than the one in which the decree was rendered and of the right to recover damages against the surety in any collateral proceeding.⁴

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Footnotes

- ¹ [Beck & Gregg Hardware Co. v. Knight](#), 121 Ga. 287, 48 S.E. 930 (1904); [Phillips v. Eggert](#), 133 Wis. 318, 113 N.W. 686 (1907).
- ² [Wm. R. Moore & Co. v. Rooks](#), 71 Ark. 562, 76 S.W. 548 (1903) (where no actual damages were alleged or proved, the constable's death before the return day relieved the bondsperson from liability to a penalty on account of the constable's failure to make a return of the writ).
- ³ [Orgill Bros. and Co., Inc. v. Rhodes](#), 669 S.W.2d 302 (Mo. Ct. App. S.D. 1984).
- ⁴ [Morgan v. Fidelity & Deposit Co. of Maryland](#), 66 Wash. 649, 120 P. 106 (1912).

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§ 83. Failure to pay over money

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4), 157(5)

Forms

Complaints Regarding Sheriff's Failure to Pay Money Realized on Sale of Property, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

The sureties on a sheriff's statutory bond are not liable for the payment of the funds received by the sheriff in a case in which the court finds that gratuities paid to the sheriff are not public funds to which the county is entitled.¹ In addition, sureties have been found not liable for the unlawful collecting of fees in excess of those allowed by law.²

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Footnotes

¹ [Thomas v. Williford](#), 259 Ark. 354, 534 S.W.2d 2 (1976).

² [Jennings v. Bode](#), 51 Fla. 229, 40 So. 194 (1906).

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§ 84. Acts done without process, in excess of authority, or under void or irregular process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

Where an officer, assuming to act as such, commits a wrong under circumstances not imposing any duty to act at all, the wrong is not a violation of any official duty, and the surety is not liable for false imprisonment¹ under a void warrant,² or without a warrant in the absence of circumstances justifying an arrest without a warrant.³

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Footnotes

- ¹ [Taylor v. Shields](#), 183 Ky. 669, 210 S.W. 168, 3 A.L.R. 1619 (1919).
- ² [People v. Beach](#), 49 Colo. 516, 113 P. 513 (1911) (stating the rule).
- ³ [People v. Beach](#), 49 Colo. 516, 113 P. 513 (1911); [Taylor v. Shields](#), 183 Ky. 669, 210 S.W. 168, 3 A.L.R. 1619 (1919).

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1. In General

§ 85. Unlawful searches

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Sureties on the bond of a sheriff or other peace officer have frequently been found liable for unlawful searches made by such officers.¹ In some cases, liability of the sureties is predicated upon acts committed by virtue of office² while others base the surety's liability on acts committed by color of office.³ Reflecting the modern trend,⁴ some cases regard the distinction as having little importance.⁵

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Footnotes

- ¹ [Lynch v. Burgess, 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849 \(1929\).](#)
As to the liability of officers who commit an unlawful search, see Am. Jur. 2d, Searches and Seizures[[Westlaw®\(r\) Search Query](#)].
- ² [Geros v. Harries, 65 Utah 227, 236 P. 220, 39 A.L.R. 1297 \(1925\).](#)
- ³ [Lynch v. Burgess, 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849 \(1929\).](#)
- ⁴ [§ 79.](#)
- ⁵ [Geros v. Harries, 65 Utah 227, 236 P. 220, 39 A.L.R. 1297 \(1925\); Lynch v. Burgess, 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849 \(1929\).](#)

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1. In General

§ 86. Unlawful arrest

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

Forms

Complaints Regarding Arrest and Custody, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

If an officer acting under a writ mistakes another for the person wanted, and arrests that person, it is generally found that there is a breach of the official bond.¹

However, the liability of the surety is not so clear when the officer makes an arrest unlawfully, without a warrant, or under a void warrant. According to one view, if an unlawful arrest is made under such circumstances, the act of the officer is a personal act or trespass for which the sureties are not liable.²

The more liberal cases, while holding that there is no liability upon the surety for acts done neither by virtue of nor under color of the office,³ declare that where an officer acts in excess of authority in making an arrest without a warrant, it is done under color of office and the sureties are liable for it.⁴ Statutes which impose upon sureties liability for acts of an officer done under color of office bind them for an illegal arrest without a warrant.⁵

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Footnotes

- 1 [State v. Cunningham](#), 113 W. Va. 244, 167 S.E. 595 (1933).
As to liability of sureties for injury or death caused in making or attempting to make an arrest, see § 90.
- 2 [People v. Beach](#), 49 Colo. 516, 113 P. 513 (1911); [Taylor v. Shields](#), 183 Ky. 669, 210 S.W. 168, 3 A.L.R. 1619 (1919).
- 3 § 69.
- 4 [State ex rel. Harbin v. Dunn](#), 39 Tenn. App. 190, 282 S.W.2d 203 (1943).
As to liability of sureties on the officer's bond for assaults, personal injuries, or death caused by the officer in making or attempting to make arrests, see § 90.
- 5 [State ex rel. Harbin v. Dunn](#), 39 Tenn. App. 190, 282 S.W.2d 203 (1943).

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§ 87. Tort by deputy in making arrest

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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According to the facts involved, including the terms of the bond and the provisions of applicable statutes, the courts, in some cases, have found that a sheriff, marshal, or constable is liable on a bond for a deputy's tort in making an arrest.¹

A court may require that the acts of the deputy complained of be an official act directly connected with the doing of an official act and constituting a part thereof to hold the sureties on the sheriff's bond liable.² In other cases, however, the sureties on the sheriff's bond have been absolved from liability for torts of a deputy committed in making an arrest.³

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Footnotes

- 1 [West v. Cabell](#), 153 U.S. 78, 14 S. Ct. 752, 38 L. Ed. 643 (1894); [State ex rel. Coffelt v. Hartford Acc. & Indem. Co.](#), 44 Tenn. App. 405, 314 S.W.2d 161 (1958).
As to liability of sheriff for acts of a subordinate, see §§ [56](#) to [62](#).
- 2 [People v. Beach](#), 49 Colo. 516, 113 P. 513 (1911).
- 3 [Commonwealth v. Hurt](#), 23 Ky. L. Rptr. 1171, 64 S.W. 911 (Ky. 1901).

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§ 88. Injury to property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

Forms

Complaints Regarding Property Seized Under Process, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

Where: (1) the writ under which a levy is made is valid on its face; (2) the court had jurisdiction of the subject matter; and (3) the officer, in making the levy, acted by virtue of office, the surety on the official bond is liable for damage to property caused by the officer while it is in the officer's possession and custody¹ or while attempting to execute civil process.²

If a peace officer in the discharge of official duty fails to take the precaution or exercise the care which due regard for others requires, resulting in injury to the property of another, such conduct constitutes misfeasance, and the sureties on the bond are liable.³

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Footnotes

¹ [Chase v. MacDonell, 1932 OK 8, 154 Okla. 165, 7 P.2d 465 \(1932\).](#)

- 2 [Palmer v. King](#), 41 App. D.C. 419, L.R.A. 1916D,278, [Am. Ann. Cas. 1915C](#), 1139, 1914 WL 21732 (App. D.C. 1914).
- 3 [U.S. Fidelity & Guaranty Co. v. Samuels](#), 116 Ohio St. 586, 5 Ohio L. Abs. 349, 157 N.E. 325, 53 A.L.R. 36 (1927).

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VIII. Liability of Sureties on Official Bonds

B. Liability for Particular Acts

2. Assaults, Personal Injuries, or Death

§ 89. Liability for assaults, personal injuries, or death generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

Forms

Complaints Regarding Arrest and Custody, see Am. Jur. Pleading and Practice Forms, Sheriffs, Police, and Constables [\[Westlaw®\(r\) Search Query\]](#)

It has become a general rule, adaptable as needed to a particular state's limitations with respect to the nature of a specified act as an official one, that under a bond of a peace officer broad enough to assure the faithful performance of duties, the surety is civilly liable for the negligent killing of or injury to any person toward whom the officer was bound to use care, of whatever degree, where the wrongful act arises in the course of the performance of a duty of office, either under color, or (where it is required) by virtue, of office.¹

The variety of the holdings on this issue reflect the differences among the states as to whether specified acts of a peace officer are official. Thus, the surety of a marshal has been liable for an act of the marshal in killing, without justification, a person arrested,² and the surety on a sheriff's bond has also been liable where the sheriff, in the discharge of the duties of office, assaults a person without provocation or necessity.³ On the other hand, the sureties on the bond of a sheriff were not liable for the acts of their principal who attempted to stop, without a warrant, a man who was quietly proceeding along the highway, killing him in an exchange of shots which followed his refusal to stop.⁴

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Footnotes

- 1 Towle v. Matheus, 130 Cal. 574, 62 P. 1064 (1900); Culpepper v. U.S. Fidelity & Guaranty Co., 199 Ga. 56, 33 S.E.2d 168 (1945); Reynolds v. Griffith, 126 W. Va. 766, 30 S.E.2d 81 (1944).
- 2 Growbarger v. U.S. Fidelity & Guaranty Co., 126 Ky. 118, 31 Ky. L. Rptr. 555, 102 S.W. 873 (1907).
- 3 State, to Use of Hill v. Fidelity & Deposit Co. of Md., 200 Md. 194, 88 A.2d 457 (1952).
- 4 Jordan v. Neer, 1912 OK 373, 34 Okla. 400, 125 P. 1117 (1912).

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B. Liability for Particular Acts

2. Assaults, Personal Injuries, or Death

§ 90. When making or attempting to make arrest or when preventing escape

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

Trial Strategy

[Excessive Force by Police Officer, 21 Am. Jur. Proof of Facts 3d 685](#)

Sureties on the official bond of a sheriff or other peace officer are frequently liable for injury inflicted or death caused by the act of the officer in attempting to make an arrest for a felony or for an offense less than a felony.¹ Liability may also be imposed upon the surety of an officer for injury or death caused by a deputy of that officer in the course of making an arrest for a felony² or for an offense less than a felony.³

As is the case with other aspects of the surety's liability for different acts by the peace officer,⁴ some cases distinguished acts done by virtue of office and acts done under color of office in determining whether the surety is liable for the peace officer's infliction of injury or death in attempting to make an arrest, but the distinction is no longer very important.⁵ Many cases hold the bondspersons equally liable with the officer regardless of whether the act is done by virtue of or under color of office.⁶

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Footnotes

- 1 [Bassinger v. U.S. Fidelity & Guaranty Co.](#), 58 F.2d 573 (C.C.A. 8th Cir. 1932); [Helgeson v. Powell](#), 54 Idaho 667, 34 P.2d 957 (1934); [City of Advance ex rel. Henley v. Maryland Cas. Co.](#), 302 S.W.2d 28 (Mo. 1957). As to the force which may be used by an officer in arresting for misdemeanors and felonies, see Am. Jur. 2d, Arrest[Westlaw®(r) Search Query].
- 2 [Helgeson v. Powell](#), 54 Idaho 667, 34 P.2d 957 (1934); [Hinton v. Sims](#), 171 Miss. 741, 158 So. 778 (1935).
- 3 [Chaudoin v. Fuller](#), 67 Ariz. 144, 192 P.2d 243 (1948); [Pfannenstiel v. Doerfler](#), 152 Kan. 479, 105 P.2d 886 (1940).
- 4 § 79.
- 5 [American Guaranty Co. v. McNiece](#), 111 Ohio St. 532, 3 Ohio L. Abs. 10, 146 N.E. 77, 39 A.L.R. 1289 (1924); [Geros v. Harries](#), 65 Utah 227, 236 P. 220, 39 A.L.R. 1297 (1925); [Jahns v. Clark](#), 138 Wash. 288, 244 P. 729 (1926).
- 6 [Lee v. Charmley](#), 20 N.D. 570, 129 N.W. 448 (1910); [American Guaranty Co. v. McNiece](#), 111 Ohio St. 532, 3 Ohio L. Abs. 10, 146 N.E. 77, 39 A.L.R. 1289 (1924).

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2. Assaults, Personal Injuries, or Death

§ 91. Liability under wrongful-death statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Sheriffs and Constables](#)  157(4)

Trial Strategy

[Wrongful Death of Minor in Police Custody, 69 Am. Jur. Trials 1](#)

The decisions in many cases involving the liability of sureties on official bonds, for an unjustifiable killing of a person by a sheriff or other officer, turn, as in cases of personal injury, upon whether the act of the officer was done under color of or by virtue of office,¹ or was done in an individual capacity.²

Where the death statute in terms provides a remedy for an unjustifiable killing, and the killing is done by the officer in such a manner and under such circumstances as to constitute a violation of the terms of an official bond, the surety on the bond has been liable.³

A sheriff and the sureties on the bond are liable for the killing, by deputy sheriffs, of a person, under the mistaken belief that the person is one for whose arrest on a charge of felony they have a warrant, and that the killing is necessary to prevent escape where a statute provides that the sheriff must be liable on a bond for any misconduct or default of deputies.⁴

Footnotes

- 1 As to acts as done by virtue of or under color of office, generally, see [§ 79](#).
- 2 [§ 90](#).
- 3 [Moore v. Lindsay](#), 31 Tex. Civ. App. 13, 71 S.W. 298 (1902).
- 4 [Johnson v. Williams' Adm'r](#), 111 Ky. 289, 23 Ky. L. Rptr. 658, 63 S.W. 759 (1901).

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2. Assaults, Personal Injuries, or Death

§ 92. When executing civil writ or process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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While there is some conflict as to whether an unjustifiable assault when serving a civil writ or process will support an action against the sureties on an officer's official bond, the better rule holds the sureties liable.¹

The terms of the bond or the statute under which it was given may affect the question. Thus, under a bond providing only that the constable would faithfully execute and return all process directed to the constable and pay over according to law all money that should come into the constable's hands by virtue of office, no cause of action is stated against the sureties on a constable's bond where it is alleged that the officer, without showing or serving any process, assaulted a person on that person's premises.²

A bondsperson or surety of a peace officer has been liable for the results of negligent operation of a motor vehicle by the officer where the officer was acting under pretense of the authority of office.³ However, liability has been denied where the officer's acts while operating the vehicle were not regarded as being a part of the officer's official business and where negligence in driving was regarded as not an act done by virtue of or under color of office.⁴ In other cases, the sureties on a peace officer's bond conditioned for the faithful performance of duties are liable for the unlawful conduct of such officer in this respect whether done under color of or by virtue of office.⁵

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Footnotes

¹ [Greenberg v. People, 225 Ill. 174, 80 N.E. 100 \(1906\)](#) (assault committed in the course of seizing property under an execution).

- 2 [Davis v. Hall](#), 72 Or. 220, 143 P. 893 (1914).
3 [Jones v. Buckelew](#), 247 Ala. 475, 25 So. 2d 23 (1946).
4 [Culpepper v. U.S. Fidelity & Guaranty Co.](#), 199 Ga. 56, 33 S.E.2d 168 (1945).
5 [Village of Barboursville ex rel. Bates v. Taylor](#), 115 W. Va. 4, 174 S.E. 485, 92 A.L.R. 1093 (1934) (overruled
on other grounds by, [State v. Choat](#), 178 W. Va. 607, 363 S.E.2d 493 (1987)).

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